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90-1241

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

YMCA OF THE PIKES PEAK REGION,

Petitioner,

---against---

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a court should grant deference under the standard elucidated in Universal Camera v. NLRB, 340 U.S. 474 (1971) to the findings of the National Labor Relations Board ("NRLB" or "Board") when the findings necessarily implicate federal anti-discrimination law, namely Title VII, 42 U.S.C. §2000e ("Title VII"), over which the courts, rather than the Board have the greater expertise?

2. Whether the standard enunciated in Coors Container Co. v. NLRB, 628 F.2d 1283 (10th Cir. 1980) that Section 7 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §157, protects impulsive conduct that occurs in labor disputes is the appropriate standard for

determining whether calculated and abusive conduct towards a teenager who has filed a complaint of sexual harassment and who is not involved in a labor dispute is conduct protected by Section 7?

3. Whether, in circumstances where an employer has a well-grounded fear of Title VII exposure and accordingly discharges an employee for contributing to a pattern of sexual harassment and unlawfully retaliating against a teenager who has complained of sexual harassment, a court can effectively disregard the mandates of Title VII and adopt the NLRB's finding that the discharged employee's behavior was protected by Section 7 of the LMRA?

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PETITION FOR WRIT OF CERTIORARI

The YMCA of the Pikes Peak Region ("YMCA") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit").

OPINIONS BELOW

The decision of the Administrative Law Judge ("ALJ") is unreported and reprinted as Appendix A, *infra*. The decision of the NLRB upholding the ALJ's decision is reported at 291 NLRB No. 141, and is reprinted as Appendix B, *infra*. The opinion of the Court of Appeals for the Tenth Circuit is reported at 914 F.2d 1442, and is reprinted as Appendix C, *infra*.

JURISDICTION

The judgment of the Tenth Circuit was entered September 26, 1990. Petitioner timely requested rehearing and suggested rehearing *en banc* to the Court of Appeals, which denied both in an order dated October 25, 1990 (Appendix D), making the petition for certiorari due on December 26, 1990. This Court has jurisdiction to issue the requested writ under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. §2000e - 2(a)(1) provides in relevant part:

"... It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin;...."

42 U.S.C. §2000e - 3(a) provides in relevant part:

"... It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to

discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C. §§2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. §§2000e-2000e-17]."

29 U.S.C. §157 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. §158(a)(3)]."

29 U.S.C. §158(a) provides in relevant part:

"... It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. §157];...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;..."

29 C.F.R. §1604.11 provides in relevant part:

"(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ...

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. ...

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."

STATEMENT OF THE CASE

A. Summary of Facts

This case arises out of the discharge of Rita Ague ("Ague"), an employee of the YMCA of the Pikes Peak Region, Inc. ("YMCA"), for her interference in the YMCA's attempt to cure a hostile environment based on a sexual harassment charge filed against another employee, Wes Beal ("Beal"). Ague, Beal and Marnie Duke ("Duke") were all part-time employees of the YMCA. Ague and Beal were swimming

instructors and Duke was a lifeguard. On March 5, 1986, Beal was discharged because of the results of an investigation that grew out of charges of sexual harassment filed by Duke and another female employee pursuant to the YMCA's published anti-harassment policy. The investigation revealed that Duke had suffered repeated humiliation at the hands of Beal; only after much anguish did she garner the courage to report Beal's conduct.

Duke, a sixteen year old high school student, was very disturbed by the harassment itself and also by the possibility of retaliation because she filed the charges. She relied upon the YMCA's assurances that she would be protected from further abuse. Duke's

fears were realized when Ague, a co-worker, who was significantly older than Duke, telephoned Duke one morning just when she had to leave for school and demanded to know "why the hell" Beal had been fired. Despite Duke's protestations that she had to leave for school, Ague relentlessly and demeaningly pressed Duke in an attempt to force her to reveal the embarrassing details of Beal's harassment, stating that "it wasn't as if he asked you to go to bed with him or anything."

Needless to say, this telephone interrogation considerably upset Duke. Subsequently, she and her mother contacted Ray Weber ("Weber"), the manager of the YMCA. Mrs. Duke demanded that the YMCA protect her daughter from further

retaliation. In response to Duke's and her mother's concerns, and in response to his own concerns about the YMCA's liability under Title VII, Weber confronted Ague with the telephone conversation as related by Duke. Ague admitted that Duke's version of the conversation was substantially correct. The only justification she advanced to Weber at that time for her insulting behavior toward Duke was that she, Ague, was "curious." She also stated that Duke didn't know what sexual harassment was. She would give the YMCA no assurances that she would stop her "investigation" into Beal's discharge. Later that day, Weber informed Ague of his decision to discharge her based on the Dukes' complaint and

Ague's insensitive and persistent interference in the YMCA's protection of Duke as a sexual harassment victim.

Ague had been one of the leading union supporters at the YMCA in a union campaign that had occurred some months earlier. The impetus behind the campaign had dissipated by the time of Ague's discharge and no election had ever been held.[1] The attorney for the Office and

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[1] Ague thought Beal was a company "spy" until his discharge. At that time, Ague did a complete turn-around and suggested to Beal that his discharge was motivated by anti-union sentiments. On March 12, 1986, after his discharge, Beal filed a charge (Charge No. 27-CA-9589) with the NLRB alleging discrimination based on union activity. In his letter dated April 23, 1986, Michael Belo, the attorney for the regional office of the NLRB, stated that, after investigating this charge, he was satisfied by the YMCA's evidence that Beal was discharged for lawful reasons; namely, his unlawful sexual harassment of

Professional Employees Local Union No. 5 ("Local 5") filed unfair labor practice charges against the YMCA claiming that Ague's conduct was protected concerted activity under Section 7 of the LMRA.

B. Proceedings Below

Procedurally, this case originated with two unfair labor practice charges filed by Local 5 (Charge No. 27-CA-9482 and Charge No. 27-CA-9589-2). The first Charge filed and later amended alleged that the YMCA had violated §8(a)(1) and (3) of the LMRA, 29 U.S.C. §158(a)(1) and (3), by threatening to reduce Ague's hours in retaliation for her union activities and by issuing a letter of reprimand to

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Duke.

another employee in response to her talking about union activities.[2]

Local 5 and the YMCA entered into a Settlement Agreement resolving the issues in the first Charge. Subsequently, another unfair labor practice charge was filed by Local 5 alleging that the YMCA had violated §8(a)(1), (3), and (4) of the LMRA, 29 U.S.C. §158(a)(1), (3), and (4), by discharging Ague in response to her union activities.

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[2] Bernadette O'Bryan, another YMCA employee who was also a union supporter, was reprimanded for attempting to discuss union organization with Dennis Schwed, a mildly retarded employee with severe emotional problems, on work time. O'Bryan called Schwed a coward for not supporting the union. This upset Schwed considerably and caused him to be unable to properly perform his job for several days. After the Charge was filed, as part of a Board settlement, the YMCA removed the reprimand letter to O'Bryan from her personnel file.

The Regional Director for the NLRB filed its order revoking the Settlement Agreement and consolidating the Charges on October 21, 1986. A trial on the Consolidated Complaint was held before ALJ Earldeane V.S. Robbins on April 21, 22, and 23, 1987. On September 9, 1987, the ALJ ruled that Ague's discharge violated §8(a)(1), (3), and (4) of the LMRA as the discharge was equivalent to a reprisal for Ague's union activities. In addition, the ALJ ruled that the letter of reprimand to the other employee also violated §8(a)(1).

On December 5, 1988, the NLRB upheld the ALJ's decision. The Tenth Circuit had jurisdiction to hear an appeal from the Board's Order pursuant to 29 U.S.C. §160(f). On September 26, 1990, the

United States Court of Appeals for the Tenth Circuit granted enforcement of the Board's order. Finally, on October 25, 1990, the Court denied Petitioner's petition for rehearing and suggestion for rehearing en banc. Neither the Board nor the Court of Appeals addressed the important policy considerations embodied in Title VII.

REASONS FOR GRANTING THE WRIT

Petitioner requests a writ of certiorari because this case involves a decision by a court of appeals that conflicts with its earlier decisions as well as decisions of other courts of appeals. See Sup. Ct. R. 10(a). This case involves as well a court of appeals' application and construction of two acts

of Congress that conflict with applicable decisions of this Court. See Sup. Ct. R. 10(c).

This case represents an opportunity for this Court to redress a serious misapplication of federal labor law as well as a gross miscarriage of justice. It also presents far-reaching questions of federal labor law arising out of the conflict between two fundamental principles, the employee's right to engage in protected activity under Section 7 and the employer's duty to protect sexual harassment victims under Title VII. No court has resolved this question. Yet, the resolution of this issue will have a significant effect on future labor law disputes.

A. The NLRB's finding that Ague's termination was an unfair labor practice is not entitled to great weight, as the Board had no great expertise in understanding the interaction of Title VII with its own statute; the record viewed as a whole is devoid of substantial evidence to show that Ague was terminated because she was a union adherent.

Whether on the record as a whole there is substantial evidence to support an agency's findings is a question that Congress has placed in the keeping of the Courts of Appeals. Universal Camera v. NLRB, 340 U.S. 474, 491 (1971). In Universal Camera, Mr. Justice Frankfurter stated that the Supreme Court "will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." Id. This case represents

just such a rare instance. Petitioner requests that this Court vacate the Board's findings and reverse the opinion of the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit").

The Board, in its brief to the Tenth Circuit, used Universal Camera as a shibboleth. The Board assumes that once it cites Universal Camera, its findings are unassailable, no matter how contrary these findings are to other federal statutes. The opinion in Universal Camera, however, belies the Board's facile assumption. In Universal Camera, Justice Frankfurter elucidated the Courts of Appeals' standard of review when considering whether to enforce an order of the NLRB. The Board's findings within the

field of its expertise carry the authority of an expertness that courts do not possess and therefore must respect. Id. at 488. Deference is therefore appropriate where a court addresses the Board's findings only with respect to the field of its expertise. See also Board of Governors v. Department of Labor, 917 F.2d 812 (4th Cir. 1990) (in instances where an agency has ruled on a question of law outside its area of expertise, courts no longer defer to the rulings of the agency, but instead conduct the more searching inquiry of de novo review). Even where the Board's findings concern its field of expertise, however, a reviewing court may not enforce the order by rote but is required to canvass "the whole record" to

determine whether the Board's findings are supported by **substantial** evidence. Reviewing courts bear the responsibility as well for assuring that the Board keeps within reasonable bounds:

> The Board's finding are entitled to respect, but they must nonetheless be set aside when the record before a Court clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence, or both.

Id. at 490.

The Tenth Circuit based its decision, granting the Board considerable deference, based upon the "substantial evidence" rule. Appendix C, p. 15. Yet, as Justice Frankfurter emphasized in Universal Camera, this rule was instituted precisely

to prevent courts from rubber-stamping Board findings. The Board's findings are not entitled to great weight where of necessity the Board must mesh its own statute with another equally compelling federal statute over which the courts, rather than the Board, have the greater expertise. In this case, the Board erred by misapplying and misapprehending its own as well as another federal statute. The Tenth Circuit erred by granting the Board deference to which the Board was not entitled, as well as by contradicting established federal law regarding Title VII. The Board found that Ague's conduct was protected by the LMRA. The subject matter of protected conduct clearly is within the Board's special

expertise. The Board's finding was a serious misapplication of the law, however, when balanced with the Title VII interests involved. Moreover, there was a paucity of evidence in the record to substantiate the Board's finding that Ague was terminated for being a union adherent. The record was replete with evidence that the YMCA terminated Ague out of a well-grounded fear of Title VII liability. The Board could have disregarded this evidence as uncompelling only because the Board has no expertise in Title VII matters.

Not only did the Tenth Circuit misapply the "substantial evidence" rule, but its opinion directly contradicts the law of the Tenth Circuit and other federal circuits. See Sup. Ct. R. 10(a) and (c).

The Court should accept this case as one of the rare cases fit for its review because the decisions below represent a gross miscarriage of justice and erode Title VII principles. Moreover, the impact of the decision upon the employer is unduly harsh. The YMCA has been penalized unjustly for obeying the mandates of Title VII.

B. The Board's determination that Ague's conduct was protected by Section 7 is a misapplication of the law; the rude and insensitive manner in which Ague conducted her investigation placed her conduct outside the protection of Section 7.

Under Section 7 of the LMRA, an employee's actions performed on behalf of other employees in an effort to acquire mutual benefit are concerted. Concerted action may include activities that at

first glance appear to be solely for the individual's benefit, but have the long-run effect of benefitting other employees. See, e.g., Mushroom Transportation Company v. NLRB, 330 F.2d 683 (3d Cir. 1964; (preliminary discussions are not disqualified as concerted activity provided that group action of some kind is contemplated); see also NLRB v. Empire Gas, Inc., 566 F.2d 681 (10th Cir. 1977); Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357 (4th Cir. 1969); Dreis & Krump Manufacturing Co. v. NLRB, 544 F.2d 320 (7th Cir. 1976); Randolph Division, Ethan Allen, Inc. v. NLRB, 513 F.2d 706 (1st Cir. 1975). In this case, Ague's phone call to Duke may be characterized as an

attempt to satisfy her own curiosity. The Board determined and the Tenth Circuit agreed, however, that the call was concerted action to collect more information about Beal's discharge to aid Local 5's investigation of his case. Petitioner accepts this conclusion of law.

Even though Ague's conduct may have been concerted, her conduct was not protected by the LMRA. Although concerted activity may remain protected even when it gets slightly out of hand because of the impulsiveness inherent in an on-going union dispute, see, e.g., Coors Container Co. v. NLRB, 628 F.2d 1283 (10th Cir. 1980), the concerted actor is still constrained if the conduct is not the impulsive by-product of a labor dispute or

if it is addressed to a person who is not involved in a labor dispute. See, e.g., Timpte Inc. v. NLRB, 590 F.2d 871 (10th Cir. 1979) (termination of employee because he refused to refrain from using obscene language in his communications with union members not unlawful where employee's behavior was not impulsive, but rather was calculated); Montgomery Ward & Co. v. NLRB, 374 F.2d 606, 608 (10th Cir. 1967) (Montgomery Ward I) (company properly refused to re-employ striker who yelled obscene language at a person not involved in the labor dispute; a "casual person" is entitled to a far higher degree of control upon the part of the picketer).

Nor are discriminatory statements protected, even when uttered in the midst

of a labor dispute. Montgomery Ward & Co., 145 NLRB 846, 55 LLRM 1063 (1964), modified and enf'd by Montgomery Ward & Co. v. NLRB, 339 F.2d 889 (6th Cir. 1965) (Montgomery Ward II). In Montgomery II, the Board held that termination of the leading union adherent and organizer was proper where the primary reason for his termination was a single statement that he made in front of a Mexican employee that, once the employer went union, employees would not have to work with "wetbacks and niggers." 55 LRRM at 1065. Doubtless the Board in 1964 was sensitized to race discrimination by the then recent passage of Title VII. The Board's decision in this case reveals that it is not sensitized to the breadth and subtlety of

sexual harassment in the work place, which is equally forbidden by Title VII.

Here, Ague's conduct was not impulsive. She testified that she thought "long and hard" before she made the call. Nor was her conduct directed toward a person involved in a labor dispute. As Judge Baldock of the Tenth Circuit panel stated in dissent, "Ague directed her derisive comments, not toward her employer, but rather toward a highly-reticent sixteen-year-old girl with no involvement in the unionization effort." Appendix C, dissenting opinion, p. 35. Moreover, the Board contravened its holding in Montgomery Ward II that it would not recognize discriminatory remarks as protected, even when uttered by a

leading union adherent and organizer. The Board and Tenth Circuit were manifestly in error when they determined that Coors controlled this case, rather than Timpte and Montgomery Ward I and II.

Even if Ague's conduct had been impulsive within the meaning of Coors, it was not protected by Section 7. Actions that are unlawful, violent, in breach of contract, or indefensible are not protected by Section 7. See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).[3] Ague's phone call to Duke was

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[3] This concept of a threshold for protected, concerted behavior has been widely accepted. See NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942); Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir. 1950); Crown Central Petroleum v. NLRB, 430 F.2d 724 (5th Cir. 1970); NLRB v. Wichita Television Corporation, 277 F.2d 579 (10th

not protected by Section 7 because it was indefensible as well as unlawful under Title VII. As Judge Baldock determined, Ague's conduct was so abusive as to be simply indefensible:

> Informing a sixteen year old victim of sexual harassment that "it wasn't as if he asked you to go to bed with him or anything," after ignoring her repeated pleas to end the conversation is indefensible. For a stranger in this situation to subject a victim of sexual harassment to an explicit inquisition over precisely what formed the basis of her complaint when such information already had been provided to the YMCA and the victim clearly did not wish to discuss the matter is beyond acceptable discourse.

Appendix C, dissenting opinion, pp.33-34.

Furthermore, Ague's conduct was illegal because it was retaliatory under

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Cir. 1960); NLRB v. Empire Gas, Inc., 566 F.2d 681 (10th Cir. 1977); Container Co. v. NLRB, 628 F.2d 1283 (10th Cir. 1980).

Title VII, thereby contributing to a hostile environment. Title VII protects employees from discrimination and harassment by their employers based on race, color, religion, sex, and national origin. 42 U.S.C. §2000e(2)(a)(1). Title VII protects employees not only from initial acts of discrimination but also from retaliatory acts in response to the employee's reporting discriminatory conduct. 42 U.S.C. §2000e(3)(a). In this case, Title VII required that Duke, the victim of harassment, be protected both from any further advances by Beal and also from retaliatory acts in response to her filing charges against Beal. See, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (Title VII affords employees the

right to a work environment free of "intimidation, ridicule, and insult"; liability for a hostile environment is determined according to common law agency principles); Baker v. Weyerhaeuser, 903 F.2d 1342 (10th Cir. 1990) (the critical question in determining the liability of the employer is whether the victim's supervisor or others knew or should have known of the harassment and did nothing to correct it, not whether the harasser was the victim's supervisor); Garziano v. E.I. DuPont DeNemours & Co., 818 F.2d 380, 388 (5th Cir. 1987) (employer has affirmative duty to eradicate a hostile or offensive work environment); Hunter v. Allis Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986) (employer directly liable

for torts committed by another, whether or not committed in furtherance of the employer's business, if the employer could have prevented the conduct). Ague's conduct toward Duke was intimidating, ridiculing, and insulting, and constituted a retaliatory act against Duke for lodging her sexual harassment complaint against Beal. The Board and the Tenth Circuit were in error when they determined that Ague's act was protected by Section 7.

C. The YMCA's discharge of Ague represented a legitimate effort to shield itself from Title VII liability.

The Tenth Circuit concluded that the fact that Ague was not Duke's employer or supervisor meant that the YMCA could not be held liable for her conduct, and thus did not have to take any action against

Ague. See Appendix C, at pp. 19-20. This holding contradicts the law of this Court. Federal law makes emphatically clear that an employer is responsible for the actions of its employees and for the environment in which they work. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (employers are liable for a hostile or abusive work environment according to common law agency principles); Baker v. Weyerhaueser (critical question is whether employer knew or should have known of harassment, not whether harasser was a supervisor or a co-employee). If an employer knows that the work environment is "intimidating, hostile, or offensive", and does not cure it, the employer becomes liable under Title VII. In addition, the employer is

responsible for the acts of harassment between fellow employees if he "knows or should have known" of these acts and did not take "immediate and corrective action." 29 C.F.R. §1604.11(d). The YMCA became responsible for Ague's conduct as soon as Duke and her mother informed Weber of the offensive nature of Ague's call and wanted it rectified.

The YMCA's fear of liability for Ague's act was well-grounded. It was reasonable for the YMCA to determine that Ague's act was retaliatory and contributed to a pattern of harassment directed toward Duke. A hostile environment exists where an employee has been subjected to unwelcome harassment, including sexual advances, requests for sexual favors, and

other verbal or physical conduct of a sexual nature to an extent that the harassment has affected the employee's terms and condition of employment. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982). See also Snell v. Suffolk County, 782 F.2d 1094, 1104 (2d Cir. 1986) (hostile environment exists where there is a discriminatory atmosphere adversely affecting the emotion well-being and productivity of the employee); Moffett v. Gene B. Glick Co., Inc., 621 F. Supp. 244, 270 (N.D. Ind. 1985) (hostile environment involves a concerted pattern of continuous harassment that pollutes a working environment). It is uncontested in the present case that Beal harassed Duke in a manner that violated Title VII. The Board

and the Tenth Circuit refused to acknowledge, however, that Ague's behavior, even though of a non-sexual nature, may contribute to a pattern of harassment. See Hall v. Gus Construction Co., 842 F.2d 1010 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). The Tenth Circuit's determination below is in direct conflict with its earlier opinion in Hicks, and therefore, must be vacated. See Sup. Ct. R. 10(a). In Hicks, the court decided that non-sexual verbal abuse **should** be considered along with overtly sexual acts in determining whether a hostile work environment exists. Following the Hicks standard, the YMCA correctly considered Ague's abusive phone call to be one of the

acts that contributed to a pattern of harassment directed at Duke.

The YMCA correctly afforded great weight to Duke's perception that Ague's act was aligned with Beal's actions. When an employer assesses whether a hostile environment exists, the employer must necessarily focus on the employee's perception of the work environment. If the employee perceives sexual harassment, the employer must respond. Vaughn v. Pool Offshore Co., Etc., 683 F.2d 922, 925 (5th Cir. 1982) ("The **employee's** perception of his environment is a significant factor; whether discrimination exists is, by its very nature, often a subjective inquiry"). The employee's perception, of course, must be a reasonable one. Bennett v. New York

City Dept. of Corrections, 705 F. Supp. 979, 984 (S.D.N.Y. 1989) ("if the evidence would lead a reasonable person in a similar environment under similar circumstances to find the environment offensive.") In this case, Duke and her mother perceived that Ague's act was in concert with Beal's earlier actions. Their perception was imminently reasonable, given the fact that Ague herself identified Beal in the telephone call and made it clear she was pursuing his cause. When Ague would not agree to cease and desist her undesirable intrusion into the YMCA's handling of Duke's complaint, and in fact questioned Duke's understanding of sexual harassment, it was reasonable for the YMCA to agree with the

Dukes that Ague's act was a continuation of a pattern of harassment as well as an act in retaliation for Duke's complaint. It is unconscionable that the YMCA would be penalized for taking statutorily mandated action to ensure that Duke's statutory rights were not further violated in light of Ague's intransigence.

The YMCA's action in terminating Ague was "immediate and appropriate" within the meaning of Title VII law. When notified of a claim of sexual harassment, the employer must take "immediate and appropriate corrective action **by doing whatever is necessary to end the harassment...and prevent the misconduct from recurring.**" The employer must evaluate the claim itself, the conduct

that gave rise to the claim, and alternative methods of stopping this conduct - all within the "immediate" time frame. See, e.g., EEOC v. Gurnee Inn Corp., 914 F.2d 815 (7th Cir. 1990) (employer liable where it failed promptly to cure a hostile environment, even though employer eventually took action); Baker v. Weyerhaeuser, (same). When the Equal Employment Opportunity Commission is adjudicating a sexual harassment claim, it must look at "the record as a whole and at the totality of the circumstances." 29 C.F.R. §1604.11(b). Logically, then, the employer, as the initial adjudicator of the claim, must also look at the totality of the circumstances. This method of adjudication necessarily gives the

employer a substantial amount of discretion when dealing with the employees.

Once the employer is notified of a claim of hostile environment, it must take measures that are "both feasible and reasonable under the circumstances to combat the offensive conduct", DeGrace v. Rumsfield, 614 F.2d 796, 805 (1st Cir. 1980); or take "reasonable steps to remedy [the situation]", Snell v. Suffolk County, 782 F.2d 1094, 1104 ((2d Cir. 1986); Davis v. Monsanto Chemical Co., 858 F.2d 345, 350 (6th Cir. 1988) (Title VII does require that an employer take prompt action to prevent bigots from expressing their opinions in a way that abuses or offends their coworkers).

As these cases illustrate, courts have purposely given the employer substantial discretion to analyze each unique set of circumstances and to devise the most appropriate, immediate, and effective response. In this case, the YMCA analyzed the facts presented to it by both Duke and Ague. Subsequently, it attempted to respond in a way that would protect the statutory rights of both women. The YMCA warned Ague that her conduct was abusive and that she must stop immediately. Ague refused to cooperate. Thus, when the YMCA discharged Ague, it was taking reasonable corrective action given the totality of the circumstances. This is especially so given the

substantial public policy against sexual harassment in the work place.

In Newsday v. Long Island Typographical Union, 915 F.2d 840, 845 (2d Cir. 1990), the United States Court of Appeals for the Second Circuit addressed a conflict between Title VII and the federal policy of settling labor disputes under collective bargaining agreements by arbitration. In Newsday, the court determined that "there is an explicit, well-defined, and dominant public policy against sexual harassment in the work place." Based upon this public policy, the court vacated the arbitrator's award ordering reinstatement of an employee whom the employer had discharged for sexually harassing female co-workers. The court

acknowledged that it was not authorized to reconsider the merits of an arbitration award, as so doing would undermine the deference accorded to arbitrators in interpreting collective bargaining agreements. The court recognized, however, that an arbitrator's award that is contrary to public policy embodied in Title VII must not be given deference. Consequently, the court refused to enforce the award.

By parity of reasoning, in this case the Tenth Circuit should not have deferred to the Board's determination that Ague's termination was an unfair labor practice. The Board's determination was contrary to an explicit, well-defined, and dominant public policy promoting the eradication of

sexual harassment in the work place. When Ague refused to modify her offensive behavior, the YMCA correctly gave greater weight to Duke's rights as a sexual harassment victim. Thus, in finding that Duke's Title VII rights should be subordinated to Ague's Section 7 rights, the court below contradicted both itself and important public policy.

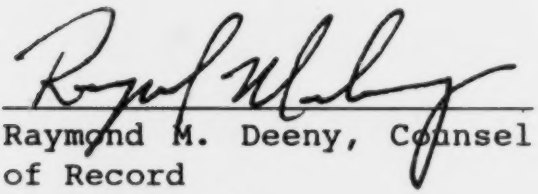
CONCLUSION

This petition presents the Court with the opportunity to redress a gross misapplication of the law and miscarriage of justice, as well as to resolve the conflict between the employer's duties under Title VII and Section 7. Resolutions of these issues would have implications extending far beyond the

facts of this case. Therefore, Petitioner urges the Court to grant its petition for a writ of certiorari and to vacate the Tenth Circuit's decision below.

Respectfully submitted,

SHERMAN & HOWARD



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APPENDICES

APPENDIX A

JD(SF)–101–87
Colorado Springs, Colo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

YMCA OF THE PIKES PEAK REGION, INC.

and

OFFICE AND PROFESSIONAL EMPLOYEES, LOCAL UNION NO. 5

Cases
27-CA-9482
27-CA-9589-2

Michael J. Belo, Esquire, of Denver, Colo. for the General Counsel.

Raymond M. Deeny, Esquire and *Fenn C. Horton, III, Esquire,* of *Sherman & Howard,* Colorado Springs, Colo., for the Respondent.

DECISION

Statement of the Case

EARLDEAN V.S. ROBBINS, Administrative Law Judge: This matter was heard before me in Colorado Springs, Colorado, on 21, 22 and 23 April 1987. The original charge in Case 27–CA–9482 was filed by Office and Professional Employees, Local Union No. 5, herein called the Union, and served on YMCA of the Pikes Peak Region, Inc., herein called the Respondent or the Y, on 19 December 1985. On 14 February 1986 the Regional Director approved a settlement agreement in Case 27–CA–9482 which was previously signed by Respondent and the

Union. An amended charge in Case 27–CA–9482 was filed by the Union and served on Respondent on 18 February 1986. The charge in Case 27–CA–9589-2 was filed by the Union and served on Respondent on 21 March 1986. The Order Consolidating Cases, Order Revoking Settlement Agreement, Consolidated Complaint and Notice of Hearing, which issued on 21 October 1986, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, by certain presettlement and postsettlement conduct.

The principal issues herein are:

1. Whether the Board should assert jurisdiction over Respondent.

2. Whether Respondent unlawfully discharged Rita Ague because of her union activities.

3. Whether the settlement agreement in Case 27–CA–9482 was properly set aside and,

4. If so, whether Respondent violated Section 8(a)(1) of the Act by interrogating an employee regarding her union activities and by certain statements alleged as coercive.

Upon the entire record and based upon my observation of the demeanor of the witnesses and consideration of the briefs submitted by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

A. *Facts*

Respondent, a Colorado corporation, is a volunteer, nonprofit, charitable, membership organization which offers health, educational, and recreational programs both to its members and the general public. Its purpose, as stated on its membership cards, is "to establish and maintain a fellowship of individuals and families of all faiths, and help its members develop Christian character, build a Christian society through activities and services which contribute to spiritual, intellectual, physical, and social growth." Respondent operates two facilities in Colorado Springs – the Downtown Center and the Garden Ranch Center – and two camping facilities. The Downtown Center and the Garden Ranch Center both have swimming pools, exercise equipment, weight rooms, locker rooms, large and small meeting rooms, and a variety of general office and multi-purpose spaces.

There are approximately 4,000 members at the Garden Ranch Center and approximately 6,000 members at the Downtown Center. The various categories of membership are children, young adults, students, senior citizens, adults, families, fitness center, single-parent families, and military. About 62 percent of these members are in a family membership. About 60 percent of the membership are adults and 40 percent are children. The annual membership fee is $50 for children, $180 for adults, $300 for families, and $450 for a fitness center membership.

All members receive the same benefits except for the 1,000 to 1,100 fitness center members. There are separate

fitness centers for men and women at the downtown Y. In addition to the benefits enjoyed by all members, fitness center members have separate locker rooms which have a sauna and whirlpool, television, free toiletries and towels, and free use of the Nautilus exercise equipment. Other categories of members pay an additional fee for the use of the Nautilus equipment, but all members have use of the Universal exercise equipment without additional cost.[1]

Respondent's principal source of income is from membership dues and program fees. During the calendar year 1986, Respondent's gross revenue of $2,674,500 was derived as follows:

Membership	$1.5 million
Programs (e.g., swim lessons, summer camps, classes, etc.)	$650,000
Contributions from United Way	$265,500
Investments (interest on cash accounts; trust accounts where YMCA is beneficiary)	$ 45,000
Contributions from community (mostly from individuals)	$184,000
Rental of YMCA facilities by other organizations	$ 30,000

During that same period of time Respondent purchased supplies and materials directly from suppliers located outside the State of Colorado in the amount of

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[1] It is unclear whether members other than fitness center members have to pay an additional cost for use of free weights.

$56,700, of which $19,300 was for purchase of large equipment, such as tanning beds and rowing cycles. Similarly, during the 6 years preceding the issuance of the complaint herein, Respondent has annually purchased, directly from outside the State of Colorado, operating supplies and items for resale valued in excess of $35,000. During the same period of time its purchase of large equipment, directly from outside the State, has varied from $6,831 to $24,696 annually.

In addition to exercise facilities, Respondent offers educational programs such as yoga, arts and crafts, weight reduction, and smoking cessation. These programs are staffed by Respondent either by employees, volunteers, or a person who is on contract. In general, Respondent charges participants fees for these programs. Fees are also charged for aquatic, swimming classes, and various physical fitness classes, and for massages in the fitness center. Additionally, a major source of program fees are camp fees from Respondent's two camp facilities, one of which is a resident facility near Deckers, Colorado, designed to accommodate 110 children and up to 50 staff members. The other, near Divide, Colorado, can sleep 40 people on an overnight basis, but is basically used by persons who go up for the day to cross-country ski or toboggan during the winter or fish during the summer. Nonmembers are permitted to use Respondent's facilities upon payment of a daily fee. However, Respondent's records do not isolate the amount of income derived from program fees from nonmembers. Swimming lessons and physical fitness classes such as aerobics and calisthenics are free to members, but nonmembers are charged a fee. Both members and nonmembers pay a fee for such things

as karate classes, yoga classes, and use of camping facilities.

Respondent is affiliated with the YMCA of the USA to which it pays a percentage of certain items of its income and from which it receives a variety of services such as an aquatic format, a retirement fund for staff, and the use of the YMCA logo. In order to maintain its affiliation with the National YMCA, Respondent must affirm to the National YMCA statement of purpose, must follow the constitution of the National YMCA, must basically run programs in keeping with those statements of purposes, must maintain a nondiscriminatory membership policy, and its chief executive officer must have gone through a prescribed amount of training.

Respondent has membership reciprocity with YMCAs in the State of Colorado, but none outside the State. Thus YMCA memberships from other locations are not transferrable to Respondent by virtue of Respondent's affiliation with the National YMCA. All local YMCAs are autonomous, and each sets its own policy as to whether it will give a new member credit for the unused portion of a membership in another YMCA. Respondent's policy is that if it receives verifying information from another location as to a person's membership, Respondent will give that person credit for whatever they have paid to the other YMCA. However, this involves no transfer of funds. On the local level, Respondent is affiliated with the USO and with the Big Brothers and Big Sisters Programs. Its affiliation with the USO is a formal one whereby the two separate

corporations are bound together by a legal affiliation agreement and operated as one entity.[2]

Respondent's policy-making body is the Metropolitan Board of Directors, which is comprised of volunteer community leaders. However, its programmatic activities are carried out by paid staff. The employee complement varies seasonally but is somewhere between 200 and 250 employees, many of whom are parttime.

B. *Conclusions*

The General Counsel concedes that Board precedent for determining the applicable standard for YMCAs is unclear. In *YMCA of Portland Oregon*, 146 NLRB 20, the Board declined to assert jurisdiction, concluding that it would not effectuate the policies of the Act to assert jurisdiction over a nonprofit, charitable, and religiously-oriented institution whose activities are noncommercial in nature and are intimately connected with the civic, educational, charitable, and religious activities of that institution. Since then, however, the Board has ruled that it will assert statutory jurisdiction over nonprofit, charitable organizations. *The Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*, 224 NLRB 1344.

In *Conway Railroad YMCA*, 237 NLRB 1151, the primary business of the employer was to provide dormitory and food services, religious activities and counseling for Conrail employees. The bulk of its income was derived

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[2] The jurisdictional amounts set forth herein do not include any USO, or other affiliated organizations, funds.

from its dormitory and food services. There the Board found that despite certain "low key" spiritual aspects of its activities, the employer was basically a commercial enterprise providing transient hotel services for Conrail employees. Since the employer's operations would meet either the Board's hotel standard, the retail standard, or the non-retail standard, the Board asserted jurisdiction. In the most recent reported case involving jurisdiction over a YMCA, the Board refused to make a jurisdictional determination based on a record which established only gross revenues and remanded the matter for the purpose of receiving evidence concerning the specific operations and services of the YMCA, and the flow of funds generated by each service or operation; and with respect to any interstate purchase or sales of goods and services by the YMCA and/or intrastate purchases or sales of goods from firms which are themselves in interstate commerce. *Greater Boston YMCA*, 243 NLRB 447.[3] Thus, although these cases are dispositive of the question of statutory jurisdiction, they afford no specific guidance with regard to any discretionary jurisdictional standard.

The General Counsel contends that Respondent is closely akin to a retail enterprise in that Respondent annually receives more than 2 million dollars in gross revenues from program fees and membership fees. The memberships entitle members to attend physical fitness classes and swimming lessons, use exercise equipment and locker facilities. Nonmembers can use the same facilities and services upon payment of a fee. Further, the General Counsel argues Respondent's operations with

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[3] That case is not subsequently reported.

respect to swimming facilities, fitness classes, and exercise equipment are very similar to those of its commercial competitors. Thus, health or athletic clubs operated for profit have facilities similar to Respondent's exercise facilities such as a lap pool, a Nautilus area, free weight area, exercise space, and often charge periodic membership fees.

Respondent argues that under *St. Aloysius Home,* supra, the Board will continue to decline jurisdiction over a charitable institution if its activities do not have a sufficient impact on interstate commerce; and that because of its purely local character, the community-service orientation of its programs, and its objectives which incorporate religious precepts and a concern for the spiritual life of its members, it cannot be considered a retail establishment; and because of this nonprofit, charitable,quasi-religious status, the Board should assert jurisdiction only if it finds that Respondent has a significant impact on interstate commerce. Thus Respondent argues, the vast majority of its financial support comes from membership dues and contributions from the Colorado Springs United Way. All of its memberships are held by local residents and its programs primarily serve individual residents of El Paso county, Colorado, and adjacent counties. It sponsors various local community programs unrelated to profit making, such as the Big Brothers and Big Sisters programs, and its upper management (Board of Directors) consists entirely of volunteers. Further, although, as a member or affiliate, it pays an annual assessment to the National YMCA, it receives no funds from the national group, is autonomous, is separately incorporated within the State of Colorado, and there

exists no reciprocity of memberships outside the State of Colorado. Respondent further argues that if the Board applies one of its existing discretionary standards, it should apply the nonretail standard. However, there seems to be no apparent basis for this latter argument other than that Respondent barely meets the jurisdictional amount for that standard and Respondent therefore argues that its impact on interstate commerce is minimal.

I reject this nonretail argument. Nothing in the record indicates that Respondent's operations is in any way akin to a nonretail enterprise. Rather, its services are directly to ultimate consumers – its individual members or to nonmembers – and its income is directly derived from them. I therefore conclude that its operations are more closely akin to that of a retail enterprise. I further conclude that its operations do not differ substantially from that of any membership club devoted to physical fitness. In this regard, there is no record evidence of any programs specifically designed to develop Christian character or to foster spiritual growth or religious precepts.

In the circumstances, I find no merit in Respondent's argument and, as its operations meet the Board's jurisdictional standards for retail establishments,[4] I find that it will effectuate the policies of the Act to assert jurisdiction over Respondent.

II. Labor Organization

The complaint alleges, Respondent admits, and I find that the Union is now, and has been at all times material

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[4] Respondent also meets a number of other jurisdictional standards.

herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Presettlement Conduct*

1. Conduct involving Rita Ague

Ague was employed by Respondent to work as a substitute on its Garden Ranch Center aquatic staff in July 1985. In September[5] she began working on a regularly scheduled part-time basis. Her immediate supervisor at the Garden Ranch Center was Fawn Kirkland, and Kirkland's immediate supervisor was Diane Sanford, the aquatic director responsible for the aquatic department at both the Garden Ranch Center and the Downtown Center. At all times material herein, Ray Weber has been the executive director of Respondent's Garden Ranch Center branch, and James Klever has been president and CEO of Respondent with authority over the metropolitan operations of Respondent.

In early October Sanford held a mandatory meeting for the aquatic staff of both the Downtown and the Garden Ranch Centers at which she discussed certain pool-related problems. When she opened the meeting for general discussion by the staff, several employees, including Ague, commented on their concerns. Ague mentioned safety problems she recently observed, resulting from the doubling-up of classes and comments other employees

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[5] Unless otherwise indicated, all dates herein from July through December are in 1985 and from January through June are in 1986.

had made to her regarding lack of wage increases and failure to pay overtime. Ague said she heard a document with a number of signatures had been presented to management, but had gone nowhere. She said she was no expert in labor law, but thought the employees should consider bringing in a union. Ray Weber's wife, an instructor on the aquatic staff, said, "You can't do that because this is a nonprofit organization." Ague said she thought Mrs. Weber was incorrect in that regard. Mrs. Weber said, "Well, you can't do it anyway, because the Y won't allow you to." Neither Kirkland nor Sanford responded to Mrs. Weber's statement. Ague then passed around an envelope for employees to sign indicating their interest in organizing a union. Five employees, including Ague, signed. Within 24 hours thereafter, Ague telephoned Local 5 at which time she was told she would be contacted by Union Agent Kitty Simmons. When Simmons telephoned Ague, they scheduled a tentative meeting.

Within 2 to 3 days after the staff meeting, Ague was called into Weber's office. This was the first time she had ever met with Weber. Both Weber and Sanford were present. According to Ague, Weber commenced the meeting by stating his concern that Ague had not reported to him the problems she mentioned during the staff meeting. He referred to a specific safety incident mentioned by Ague during the staff meeting, stated this was the first he had heard of the incident, and asked why Ague had not come to him with problems she was experiencing. Ague said she had mentioned it to Sanford at the meeting, which she thought was appropriate. Weber asked if Ague had made contact with anyone in the Union. Ague said she

had. Weber asked whom she had spoken to in the Union. Ague said she had talked to Joe Donlon's office. At some point, something was mentioned regarding the separation of employee Steve Warren from Respondent's employ at the Downtown Center. Weber said Warren had not been discharged or forced to resign, but had resigned voluntarily. Weber then asked if Ague would report to him any union activities that might be occurring, or would occur in the future. Ague said she would, only insofar as it did not threaten or endanger anyone.

Weber testified that on 7 October both Kirkland and Sanford reported to him that, at an aquatic staff meeting on 6 October, Ague had passed around a paper to be signed by employees interested in a labor union. On 8 October he asked Ague to come into his office. Sanford was also present.

Weber's account of the conversation which insured is more detailed than Ague's. However, as to those subjects mentioned in her testimony, he testified in substantial agreement with her except as to the alleged interrogation. Also he testified as to matters discussed which Ague does not include in her account. Thus, according to him, they did discuss the Steven Warren incident and his concern that Ague had not earlier reported to him the problems she mentioned in the staff meeting. He asked why she was interested in a labor union. She mentioned the safety concerns, staff complaints of short paychecks, and aquatic staff dissatisfaction at a rate of pay different from that of fitness instructors. He asked her to elaborate, which she did. Weber explained that monthly paychecks did not cover a calendar month period, but rather the pay

periods began on the 23rd of one month and ended on the 22nd of the following month.

According to Weber, when Ague elaborated as to her staffing and safety concerns, he agreed the situation was undesirable and said they were working on staffing problems. He further said that if any shift was understaffed he or Sanford should be immediately notified so they could arrange to cover the situation. he then explained the different rates of pay and that all job positions within the Y were examined by an independent committee of personnel directors from private corporations around Colorado Springs which, without any knowledge of the individuals involved, evaluated each position and assigned to it what they considered a correct and fair monetary assessment. As a result of that, Weber stated, all job positions within the Y were part of a wage and salary plan. Ague did not ask to see the plan.

Weber testified that he then asked Ague why she had not brought these things to his or Sanford's attention earlier. Ague said she believed in going through the chain-of-command. Weber explained the steps for pursuing a grievance beyond one's immediate supervisor which he said was spelled out in the personnel policy. Ague said she did not believe any of the aquatic staff had copies of the personnel policies or even knew they existed. Weber said supervisors should inform employees of these policies at the time they are hired, and that copies of the personnel policy were available at all times in Weber's office on an open shelf. Weber said he kept an open door policy and would be glad to show it to employees at any time. Weber further said he would

make copies even more available by putting them in the office area.[6]

As to the alleged interrogation, Weber testified that, after they discussed the Steve Warren resignation, he asked what Ague was going to do next. She said she did not know. Weber asked if she would tell him once she decided. Ague said maybe she should and maybe she wouldn't. Weber assured her employees were not discharged from the Y for talking about labor unions and stated he had an open door policy and she was welcome to come in and talk with him at anytime. Sanford's version of the conversation, though less detailed, essentially corroborates Weber.

Ague testified that on Monday, 14 October, she received a phone call from Fawn Kirkland during which Kirkland said Ague's hours had been cut. Ague asked if there was some problem with her work performance. Kirkland said no, that during a conversation she had with Sanford that morning, Sanford said Ague's hours were being cut radically, that Weber wanted to get rid of the troublemaker. Ague said she was going to the Union immediately regarding this, which she did.

Ague further testified that shortly thereafter she asked Sanford if there was some problem with her performance. Sanford said there wasn't, that her hours had been cut because of a reshuffling in the scheduling. Ague

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[6] Weber testified that immediately after the conclusion of this conversation with Ague, he put two copies of the personnel policy on top of the filing cabinets outside his door in the general office area and, within a few days, he permanently affixed a copy with a chain and screws to the bulletin board in the employee breakroom.

related her conversation with Kirkland. Sanford denied making the statement attributed to her by Kirkland. Ague said she was reporting the matter to the Union and asked Sanford if she was aware that Ague had been hired by Kirkland in September to work a 20-hour week. Sanford denied any knowledge of that, but said she was still in the process of reshuffling and would get back to Ague.

According to Sanford, Ague asked why her hours had been cut. Sanford said they were in the process of tightening the schedule, that too many lifeguards had been scheduled. Ague said it was rumored that her hours had been cut because of her union activities and the Union wanted her to file. Ague said she was at the right place at the right time and she thought the Union felt she would be a good test case. Ague said there would be definite problems if she was phased out at this time. Ague further said people had a right to better jobs, and pay. Sanford said they were not preventing anyone from going on to better jobs or pay; Sanford then said Ague was a quality instructor[7] whom she had no intention of phasing out.

By the end of October, Ague was again scheduled for approximately a 20-hour workweek. Sanford and Weber both testified that the variations in Ague's schedule were caused by the difficulty encountered by Sanford in making a schedule after Kirkland's abrupt resignation without leaving an intelligible schedule for the new term, and

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[7] In November, Sanford rated Ague 8 on a scale of 9 as to all performance factors.

the general problem Respondent was having at the Garden Ranch Center with the scheduling of a considerable amount of unapproved overtime hours.

Within 2 weeks after Ague contacted the Union, some of Respondent's employees met to discuss the Union, and sometime in mid-October, Union Representative Simmons met with a group of employees. By letter dated 24 October, the Union advised Respondent that it intended to organize Respondent's employees and that Ague was an active employee organizer. Shortly thereafter, Respondent retained legal counsel and on 12 November Respondent's attorney held training sessions for respondent's managers and supervisors, which dealt with what employers can and cannot do or say during a union organizational campaign and what an employer's rights are to resist a unionization effort.

On 13 and 14 November Klever held four meetings with employees, all of which followed the same format. All, or almost all, of Respondent's employees attended at least one of these meetings. Gwenda Valentine, Respondent's personnel administrator, attended all of the meetings. Klever began each meeting by making a statement and then the meeting was opened for questions and answers or comments from employees. According to Klever, although he did not use a prepared text in those meetings, he tried to deliver essentially the same address in each of the meetings.

Ague attended the first of the four meetings, which was held at the Downtown Center. According to her, Klever began the meeting by discussing the organization and the possibilities for promotions. He then [sic] the

meeting was called because of a few people who had called in the Union. He said that Colorado Springs is not a union town and then stated, "it took 100 men to build a barn, but one jackass to tear it down." He also said he would do anything he had to do, to keep the Union out. After Klever finished his comments, he asked for comments from the audience and a few people either commented or asked questions. Ague said she was the jackass to whom he had referred, that she was the person who had called the Union. Ague said she was very concerned about any number of problems at the Y, including lack of a wage scale, lack of responsiveness on the part of management to very definite problems, and the forced resignation of a young man recently who had attempted to work with management to get some improvements made in relationships, wages, etc. Klever said Ague had been observed involved in union activities during worktime. Ague said he was mistaken, that it was not worktime.

During the evening, of 14 November Ague attended another meeting at the Downtown Center. The only employees present whom she knew were Jim O'Bryan and Wes Beal. According to Ague, Klever made essentially the same statement he made during the first meeting. He spoke about the Y's history, mentioned that Colorado Springs was not a union town, and repeated the story about tearing down the barn but used the term "mules" instead of "jackass." He again stated he would do anything to keep the Union out. During the open discussion period, Ague said she was glad Klever had not referred to her again as a jackass. She said she was the main person who had brought in the Union and explained why she did so. She further said she had

become aware of problems with pay and lack of wage scale, and she was very concerned that employees had been asked to resign when they tried to organize a union. At this point, Klever said, "If you knew what a limb you've climbed out onto, you'd have heart failure."[8] Ague said, "I don't threaten easily." Klever said, "Neither do I."

Although other witnesses testified in more or less detail, with a few exceptions, there is general agreement as to what occurred at these meetings. Thus Klever testified that he opened the meetings by introducing himself and giving a word of welcome. He then said the reason for the meetings was that an unhappy employee had contacted the Union in regards to an organizing effort, which the employees had the legal right to do. He said the Colorado Springs YMCA had existed for 103 years so it obviously did a lot of things very, very well, but acknowledged that the organization was not perfect, and could improve in some areas. He then used a quotation he had recently heard on the radio, attributed to Senator Stennis, that any jackass can tear down a barn but it takes a craftsman to build one. He immediately followed that statement with an invitation to employees to be a part of positive, constructive, and continuing efforts on behalf of the staff to continue the 103 years successful history of the organization.

According to Klever, he gave several reasons why he felt a union was not in the best interest of the

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[8] According to Ague, when Klever made this statement she wrote it down.

organization, the employees as individuals, or as staff members; and suggested, as an alternative to unionization that employees, when necessary, use the grievance procedure set forth in Respondent's personnel policy. At some point, according to Klever and Valentine, Ague said the Y had no personnel policy and no salary administration plans. Klever told her she did not know what she was talking about and to please set down.

Klever's account does not include a statement that he would do anything to keep the Union out. According to him, he said Respondent would use all legal means to avoid a unionizing effort. This version is corroborated by Valentine who attended all meetings and Ron Killingsworth, manager of the physical services desk in the men's fitness center at the Downtown Center, who attended the first meeting. Valentine testified that Klever said employees had a legal right to unionize and an employer had the legal right to avoid unionization. Killingsworth testified in substantial agreement that Klever said both employees and employers had legal rights as to union organizing and further said the Y would do everything within their legal means to combat union organization.

Employee Jim O'Bryan testified that Klever said Colorado Springs was not a union town and they were not about to let the Union in now. Although Valentine's accounts do not include this remark, Killingsworth testified Klever did say Colorado Springs was a nonunion town.

Klever further testified Ague made some statements as to why she felt a union would be helpful to the

employees; and, at the conclusion of her comments, purported to read from a letter which stated that the YMCA had cut her hours and had been ordered to reinstate her hours with all backpay. Klever said, "I can't comment on this. I haven't seen that letter, so I really do not know what you are talking about."[9] Valentine does not mention this in her account. However, Killingsworth testified that although he does not recall any dialogue between Klever and Ague, he does recall that Ague read from some documents. He also corroborates Klever that he said employees could discuss anything about the Union as long as it was not disruptive. Killingsworth further testified that he does not recall Klever saying anything with regard to having been observed engaging in union activities on worktime. None of the witnesses other than Ague include this in their account.

The only other remark in dispute is Klever's statement that Ague was out on a limb. All of the witnesses agree that a statement to that effect was made following Ague's comments regarding wages and an alleged termination because of union activities. According to Ague, when she mentioned someone had been terminated for union activities, Klever said "If you knew what a limb you've climbed out onto, you'd have heart failure." According to Klever, he said, "Now you are out on a limb. If you knew everything that was going on, you'd

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[9] Klever testified that at the conclusion of that meeting he asked Valentine and Respondent's attorney if they were aware of what Ague could have been reading. They both denied any knowledge of what she might have been reading. At that time no charges had been filed with the Board.

have a heart attack."[10] Valentine testified Klever said that was a personnel issue which he would not discuss with her, that her facts were inaccurate; and if she knew how inaccurate, how far out on a limb she was, she would have a heart attack. O'Bryan testified that although he does not recall the context, Klever did say something to Ague that she had put herself out on a limb.

2. The alleged conduct involving Bernadette O'Bryan

O'Bryan was employed by Respondent from about 1979 to December 1986. During the last 2 years of her employment, she worked mainly in the physical services area in the women's fitness center. Her immediate supervisor was Ron Killingsworth. Killingsworth's supervisor was Jim Asleson. O'Bryan became involved in union activities around the end of September. She attended three union organizational meetings at Ague's house and signed a union authorization card at the first meeting. According to O'Bryan's undenied testimony, in October she told Asleson she was a union activist with the AFL-CIO. He replied, "Yes, I know." Nothing further was said. Either later that day or the next day, O'Bryan told Killingsworth she was a union activist, had signed a union card, and was trying to organize the employees. Killingsworth said, "Yes, I know, and I understand what

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[10] Klever testified that this reference was to Steve Warren who had resigned to assume another position.

you're doing." She further said she was going to play it honestly, the way she felt was really correct.[11]

On 15 November O'Bryan had a conversation with employee Dennis Schwed as they were working in the physical services area. According to O'Bryan, she asked Schwed what he thought about Klever's 14 November meeting regarding union organization. Schwed said he wanted to obtain some further information from a friend of his who knew about unions. O'Bryan agreed that was a good idea and inquired if Schwed had ever thought of talking to other Y employees. She said she was frustrated with the narrowmindedness of employees who had complained to her over the years about different policies at the Y and then would not do anything about it. Schwed said he would speak to other people. Nothing else was said. O'Bryan testified that she specifically refrained from mentioning the Union. Schwed did not testify.

On 23 November Asleson called O'Bryan into his office, handed her a letter and said, "I'm sorry I have to do this." O'Bryan read the letter, the body of which read:

> This letter will serve as official letter of warning for your remarks to Dennis Schwed concerning unionization matters during his work shift on November 15, 1985.

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[11] O'Bryan testified that when she said this she had in mind a union brochure containing questions and answers regarding employees' rights to join the Union, which was posted in the lounge area. One of the questions was "can we get together and talk about the Union during working hours." The answer was "not under this law." According to her, she understood this to mean she could not talk about union activities or meetings during work hours.

> You should understand that this instance clearly demonstrates a violation of the stated policy regarding such matters and that the penalty for any future occurrance [sic] of a like nature will be immediate and permanent termination.

She then said, "I know I was not talking about union activities to him."[12] Asleson said Schwed reported that O'Bryan called him a coward. O'Bryan said that wasn't true, that she was talking about narrowminded people, but coward was not part of her vocabulary and she did not use that word.[13] According to O'Bryan, there was no discussion of any solicitation rules.

By letter dated 11 December, which O'Bryan hand-delivered to Asleson, O'Bryan set forth her version of what occurred during this conversation with Schwed and stated that the conversation related to the employee meetings and not to current union matters or meetings during worktime. She further requested that any negative information be removed from her personnel file and stated she thought it was unfair that Schwed was not present when the letter of warning was given to her so that the matter could be clarified.

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[12] According to O'Bryan she and Schwed were not discussing union activities or meetings. Rather, they were talking about the meeting held by Klever. She further testified that she had no idea during the conversation that Schwed was upset.

[13] However in direct response to questions on cross-examination as to whether she had heard any employee call someone else a coward during working time, O'Bryan testified that she had heard administrators at the Y be cowardly toward their employees.

Killingsworth testified that on 19 November employee Bea Escobar told him she had found Schwed in the maintenance area very upset, almost to the point of tears. She asked what the problem was. He told her that as he was working, O'Bryan started a conversation which let to issues regarding the Union and then had ultimately called him a coward: and further said he was very upset about that. According to Killingsworth, he immediately related this to Asleson who told him to type it up and give him copies. Asleson said he felt if they approached Dennis about the incident he might become very upset again, and they did not want to magnify the incident in his mind. Also, since Schwed had not indicated how he felt about any kind of union activity, he felt approaching him about union conversations could be construed as coercive.

Later that day, according to Killingsworth, Schwed told him O'Bryan had approached him in the laundry area while he was working and began talking with him about union activities. He told her he did not know anything about those types of matters and then she called him a coward, which upset him. Killingsworth testified that Schwed is mildly retarded with muscular dystrophy and some very serious emotional problems. When something upsets him, he becomes very emotionally upset. He has to have a set routine and when he gets off that routine, he can focus on, and magnify, something that the average person would not consider as being important and become so offended by what is said to him that it disrupts his work.

Although Asleson, who is no longer in Respondent's employ, did not testify, he did place in O'Bryan's

personnel file an account of his conversation with her, dated 21 November 1985. This account, set forth below, essentially corroborates O'Bryan's testimony:

> I presented Bernadette O'Brien with an official letter of warning today for her remarks to Dennis Schwed on Nov. 15, 1985.
>
> After reading the letter, she remarked, "That's interesting". She recalled that she and Dennis were talking about the recent employee meetings at the time. She said that Dennis commented about his intentions to talk to a friend of his in the state legislature to get more information on labor relations. Bernadette than [sic] said that Dennis should get information from as many different sources as possible. She did not elaborate on her comments.
>
> When I mentioned that the reports I had received indicated that she called Dennis a coward, Bernadette was surprised and responded that she had been misinterpreted. She felt bad that she had hurt Dennis' feelings and said she would apologize to him. She mentioned further her comments referred to long tenure staff of the YMCA who were reluctant to take a stand on unionization issues. Lastly, Bernadette said she would document her account of the incident and forward it to me.

O'Bryan testified that several times monthly she had conversations with fellow employees in the presence of a supervisor about something that was not work related. They would talk or joke around as they worked. Prior to November 1985, no supervisor ever told her that employees were not to talk to each other during work or that employees were not to talk to each other about nonwork-related matters during working hours. Nor had

she ever been reprimanded for talking about nonwork-related matters.

O'Bryan further testified that, prior to November 1985, members and employees distributed football tickets, menus to restaurants, etc., during worktime. According to her, Killingsworth, Asleson, and Bob Small would have to be aware of these distributions because the tickets were on the counter at the reception desk and they came to the desk frequently. However, sometime in November, following her conversation with Schwed, Respondent posted some information about solicitation by the timeclock, in the lounge area, and in the women's locker room.

B. The Settlement Agreement

On 19 December the Union filed a charge in Case 27-CA-9482 alleging:

> Since on or about October 21, 1985, the Employer has harassed and intimidated employee Rita Ague for her known union activities by changing her working hours and conditions, subjecting her to unkind and demeaning statements in captive audience meetings, and by changing established policy.
>
> By the above and other acts, the above-named Employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

At some time prior to 13 February 1986, the Board's Regional Office proposed a settlement agreement which read, inter alia:

> This agreement is not intended to resolve issues other than the alleged violations which are the subject in the instant proceeding. Evidence of alleged violations resolved by this agreement may, however, be utilized as background evidence in any concurrent or subsequent proceedings involving the Board.

However, this language was deleted from the agreement finally entered into and approved by the Regional Director on 14 February 1986. The notice, attached to, and made a part of, the settlement agreement reads in pertinent part:

* * *

> WE WILL NOT threaten employees with a cut in hours because they support or are active in behalf of the OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL #5 or any other labor organization.
>
> WE WILL NOT threaten our employees with any type of retaliation because of their support of or activities in behalf of OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL #5 or any other labor organization.
>
> WE WILL NOT forbid solicitation on behalf of OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL #5 or any other labor organization during work time and in work areas where we have not established and applied in a nondiscriminatory manner a rule forbidding solicitations of any type during working time in work areas.
>
> WE WILL rescind and remove from the personnel file of BERNADETTE O'BRYAN a written letter of warning dated November 21, 1985 which relates to union solicitation.

C. The Alleged Postsettlement Conduct

1. Background and the alleged concerted nature of Ague's conduct

Ague continued to engage in union activity, holding several meetings at her home including one in late February and soliciting union authorization cards in late February and early March. On 27 February employee Wes Beal signed a union authorization card in Ague's presence. Beal was discharged on 5 March allegedly because of his sexual harassment of Marnie Duke, a 16-year-old high school student employed as a lifeguard and instructor at the Garden Ranch Center. Ague's discharge on 20 March stemmed directly from her response to Beal's discharge – a discharge Ague testified she believed may have been motivated by his union activities. On 12 March the Union filed a charge in Case 27-CA-9589 alleging that Beal had been discharged because of union activity. Nancy Ely, Weber's secretary, signed for receipt of the charge on 14 March.

Marnie Duke testified that on numerous occasions since the fall of 1985, Beal has made her extremely nervous by rubbing her shoulders and touching her hair. One [sic] one occasion in September, as he was sitting in a chair, he pulled her over by her leg, put his hands between her legs and moved his hand up her thighs. In January, as she was sitting by the pool with a towel draped over her lap, Beal sat by her, put his hand underneath the towel and went further up her leg than he had during the September incident. On both occasions, according to Marnie, she was frightened, unsure exactly how to react, and she just walked away.

She did not tell her parents because she was concerned as to how her father might react. In January she did tell follow employee Kitty Farquarharson about the incidents. Farquarharson urged her to talk to someone in management, but she did not do so because she thought Beal, Klever, and Weber were good friends and nothing would be accomplished by doing so.[14] However, she did tell Sanford she did not like working with Beal and asked if she could be transferred to the Downtown Center for her Saturday shift. She did not explain why she did not wish to work with Beal. Sanford said she had heard a few other complaints, that she would look into it and let Marnie know in the future. Beal continued to touch Marnie's hair and rub her shoulders.

Marnie testified that on 4 March Farquarharson had some problems with Beal, said she did not care if they were friends, she was going to speak with Klever. Farquarharson left the pool area, and when she returned, told Marnie that Beal and Klever were not friends and encouraged Marnie to talk with Klever.

Later that evening, Marnie spoke with Klever in Weber's office. Klever said he and Beal were not friends, he was very glad Marnie had come to him, and he encouraged her to tell him everything. She told him about

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[14] According to Marnie, whenever Klever was on supervision at the Garden Ranch Center, Beal would always talk to him for a long time and when he returned, Beal would say he and Jim had talked about various things that they were going to do and that they were very good friends. Klever testified that he and Beal were not good friends, but they did have conversations about sports.

the long breaks Beal had been taking and about the touching incidents in September and January and everything that had happened between her and Beal. Klever said he would look into it, and the situation would be taken care of.

The following morning Klever met with Valentine, Weber, and Respondent's vice president, Merv Bennett, and recounted to them the conversations he had with Farquarharson and Duke. According to Klever, at that point, a decision was made that Bennett and Weber would check out the allegations and, if true, Beal would be terminated. Weber testified Klever told him Marnie had complained that Beal had made many untoward remarks, including gross profanity, and that he had, on at least one and possibly two occasions, put his hand between her thighs underneath a towel while she was at work. According to Weber, he and Klever discussed the issue and decided that Beal should be terminated for two reasons – the sexual harassment and a previous warning about inappropriate behavior.[15] Beal was discharged on

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[15] Weber testified that, in late December, Sanford told him she had received a letter of complaint from employee Jennifer Green that Beal was being very intimidating and obnoxious to her; and that, at one point, he went to her school and attempted to put his arms around her. Sanford testified that several employees had complained that Beal had a bad attitude, was ridiculing other employees and talked a lot about his personal affairs. Weber instructed Sanford to speak to Beal. According to her, she met with him in January, discussed his attitudinal problems, told him his personal affairs and those of other employees were private and totally unnecessary on the job and that he would have to straighten out. Beal said he had not been attending his AA meetings regularly and he would reform. According to her, these initial complaints by Beal did not involve overt sexual conduct.

5 March and the Dukes were informed of this action. Following some expressions by Marnie and her mother as to their fears that Beal might attempt some form of retaliation against Marnie, Weber assured them that Respondent would take the necessary steps to ensure Marnie's safety on Respondent's premises and would assist in any way possible to ensure her safety off its premises. Mrs. Duke said she was relieved that Beal had gone and related to Weber some of the previous incidents that had upset Marnie. Weber said he was sorry and that the Y had had no idea of what had been going on.

On 8 or 9 March, Ague's first day of work following her vacation, she inquired why Beal was not in a class they usually taught together. Employee Mike Phillips said Beal had been discharged. Employee Robin Januska explained that he had been discharged because of sexual harassment complaint and, said rumors were flying around, but she did not know what was going on.

A few days later, Januska told Ague that Weber asked her if she would be willing to sign a sexual harassment complaint against Beal, but she refused. Employee Louisa Pilipowski told Ague she had heard rumors that Beal had been discharged due to a sexual harassment compliant by Marnie. Both Pilipowski and Januska suggested that Ague call Marnie to find out what was going on.

According to Ague, within 24 hours of her learning Beal had been discharged, she telephoned him and inquired as to what had happened. Beal said he had been charged for sexual harassment of Marnie Duke, but had been given no specifics as to exactly what he was alleged to have done; and that he was also told he had not

clocked out during the lunch hour. Ague asked Beal if he had done anything to Marnie to cause her to bring the complaint. He said, "No, absolutely not." Ague asked if he thought his firing could be the result of any union activity." Beal said he was not sure. Beal further said he was sure he had not endeared himself to Klever by his comment at the 14 November meeting that there is never any reason to ridicule employees in public. When Ague asked if he wanted to pursue the matter, he said he thought so, that he thought his discharge was unfair. Ague asked if he wanted her to tell the union representative what had occurred. Beal said he did.

Immediately thereafter, according to Ague, she informed Union Representative Simmons of Beal's discharge, his denial of any sexual harassment and his concern that his discharge may have been motivated by his union activity. Ague said she had been trying to determine what happened but was having a difficult time obtaining information from other employees. Simmons said she would look into the situation immediately. Thereafter, Ague agreed to give a statement regarding Beal's discharge and a meeting was scheduled between Ague and a Board agent for 19 March. Ague did give an affidavit to a Board agent on 19 March.

2. The alleged motivation for Ague's discharge

Sometime in mid-March, prior to 19 March, Ague told Sanford she wanted to speak to her regarding Beal's discharge, that she had heard the discharge was based on

a sexual harassment complaint and she was very concerned. Sanford said she was too busy to talk but would get back to Ague later. However, she never did so.

On the evening of 18 March, according to Ague, after unsuccessfully attempting to find an opportunity to discuss the Beal discharge with Marnie at work, she told Marnie she would call her at home but did not explain why she wanted to talk to her.

At about 7 a.m. on 19 March, Ague called Marnie at home. According to Ague, she said, "I've heard you filed this sexual harassment grievance and I want you to know that I'm opposed to sexual harassment in any form." Ague then said, "Marnie, what in the devil did the guy do to you to cause you to file a charge like that?" Marnie said, "Well, I don't know." Ague asked if Beal had done anything to her, if he had touched her or spoken to her or asked her to go to bed with him, and to each of these questions Marnie replied either, "No" or "Well, no. Not exactly." Marnie suggested that Ague speak to employee, Jennifer Green. Ague said she was calling because an attorney was coming from Denver that day to take a sworn statement from her and she needed to speak to Duke before she gave the affidavit. According to Ague, she further said if Beal had been discharged for the right reasons that was fine, but if he had been discharged for union activity or because of a vendetta on the part of another employee, then that wasn't good. Marnie said she did not have a lot of time to talk. Ague said she could understand that and would not keep her. Ague said she was concerned about the possibility of Beal being discharged for the wrong reasons or because of a vendetta-type situation. In this latter regard, Ague mentioned that

within the past 2 months, Farquarharson had told her she had heard that a sexual harassment charge was "a good way of getting rid of somebody you don't want working here," and had asked what one should do to establish sexual harassment. Agué said she was not sure Farquarharson understood what sexual harassment was, but had advised her to document things, to keep notes of any incidents that occurred. Marnie said, "I think you should call Jennifer Green." Ague said she would do so, thanked Marnie and ended the conversation.

Immediately thereafter, Ague called Jennifer Green and told her she had been asked to give an affidavit that day, and she had concerns as to whether Beal was being discharged because of union activities or because of a vendetta. Ague said Marnie had told her Green could explain what was going on. Ague asked if Green knew of any sexual harassment. Green said, "No, I don't think it was actually sexual harassment. The fellow was an ass, but I don't think there was sexual harassment involved." Green further said she had some difficulty with Beal. Ague asked if Beal had sexually harassed Green. Green said "No, not exactly." Green said there had been an instance of Beal putting an arm on her shoulder at a location other than the Y, but, as far as she was concerned, it wasn't actually sexual harassment. Green then said Beal was a real ass and she was glad he was fired. Green did not testify.

Marnie testified that about 7 a.m. on 19 March she received a telephone call from Rita Ague as she was preparing to leave for school. Ague identified herself and said she wanted to talk to Marnie about Wes Beal. Marnie said she had no time to talk because she was on her way

out the door to school. According to Marnie, Ague said, "Wes Beal does not know why the hell he was fired, what did you say to Weber and Klever to get him fired?" Marnie said she did not have time to talk with Ague, that she had to go to school. At this point, according to Marnie, Ague became pushy and her voice got very stern and demanding. Again, Ague said, "Wes does not know why the hell he was fired." Marnie said she had to go to school. Ague said, "I mean it wasn't as if he asked you to go to bed with him or anything." Marnie said what Beal had done was very wrong, and she did not have time to talk to Ague because she had to leave for school. Ague said she would speak with Duke that evening. Ague also said she had a man coming down from Denver with an affidavit and she had very little to go on. However she never identified this man nor did she say with whom he was affiliated.

Marnie testified that she tried to ignore Ague's questions, she was very nervous and did not know what to say. Ague was an adult, and Marnie had been taught to respect adults; but she felt that it was none of Ague's business. Further, according to Marnie, when Ague said "It's not as if he asked you to go to bed with him," her voice changed again, it was very demeaning, as if Marnie had not told the truth and did not know what sexual harassment was. According to Marnie, she was very upset by the telephone call. When she got off the phone her stomach was upset, she felt this was never going to end, she was only 16 years old and had adults coming on to her very strong. Immediately after the call ended, Marnie related the conversation to her mother. Her mother told her to go to school.

Marnie denied that Ague made a statement near the beginning of the conversation that she was opposed to sexual harassment. She did say, "Listen, honey, I'm all for the women. But, I mean, it's not as if he asked you to go to bed with him or anything." Marnie also denies that Ague said she had some concerns that Beal might have been fired for union activity or that she said Beal was going to protest his discharge. Ague never actually asked if Beal had asked Marnie to go to bed with him, or did she ask any other questions concerning Beal's conduct towards Marnie. The only question she asked was, "Why the hell Beal was fired" and "what did you say to Klever to get Beal fired." She also denies telling Ague that she should speak to Jennifer Green. Green's name was mentioned, however, when Ague asked if Marnie knew anything about Jennifer Green, Marnie replied no.

Weber testified that Mrs. Duke telephoned him on 19 March and told him Marnie was extremely upset after having received a call from Ague. She said, during the call, Ague had asked questions like, "What the hell did you do to Wes to get him fired?" and "Did Wes ask you to sleep with him?" Mrs. Duke asked what right a middle-aged woman had asking that kind of a question to a teenaged girl and wanted to know what the Y was going to do to protect Marnie from this. Weber requested that Mrs. Duke and Marnie prepare written statements, and promised to investigate the matter.

Mrs. Duke testified in essential agreement with Weber as to this conversation. According to her, after Marnie told her about the conversation with Ague, she was furious, and telephoned the Y to speak to Weber. He was not there, but he returned the call later that day. At

that time, according to Mrs. Duke, she told Weber that Ague called Marnie that morning, and asked Marnie what the hell she had said to get Beal fired, and said it wasn't as if he had asked her to go to bed with him. She told Weber they were not going to tolerate that kind of actions against their daughter, that Ague was a mature woman, Marnie was a minor, and she wasn't going to have it. Weber apologized and said he would get back to Mrs. Duke. He also said he would like a written statement of the complaint.

Marnie testified that, at 3:30 or 4 p.m. that afternoon, Weber called her and said he needed to get some answers from her, and he wanted to know exactly what had happened. Marnie told him Ague called her that morning, questioned her about Wes Beal and said she did not know what Marnie had said to get Beal fired and "Beal did not know what the hell he had been fired for." Marnie also told him Ague said it wasn't as if Beal had asked Marnie to go to bed with him or anything. Marnie further stated that Ague told her a man was coming down from Denver for an affidavit, but Marnie did not know who the man was. Weber thanked her and said that was all he needed to know at that point in time. Later that day, Weber asked her to reduce her comments to writing.

On that same day, Marnie wrote the following comments and gave them to Weber:

> This morning at 7:00 I received a phone call from Rita. She was questioning me about what I had told Jim about Wes. I wouldn't tell her anything but she kept pressing me for answers. She said Wes was told to get the hell out of the Y, and he didn't understand why.

She continued saying that she was all for the women and she could understand if Wes had asked me to go to bed with him. A man was coming down from Denver to talk to her and she was going to fill out an affidavit, but didn't have much to go on. I finally told her I had to go because I was late for school, and she said that she would talk to me later.

I don't really like the fact that she is calling me at home to question me about these things. I am afraid of Wes and I don't think it is fair that I have two adults against me, being that I am still a minor.

This is the conversation as much as my memory can recall.

3. Ague's discharge

On the morning of 20 March, Ague was called into Weber's office. Both Weber and Sanford were there. According to Ague, Weber started by asking if she was familiar with the sexual harassment complaint regarding Wes Beal. Ague said yes. Weber said Ague was being charged with harassing Marnie Duke and her family. Ague said that Marnie did not know the meaning of the word harassment. Weber asked if Ague had made a phone call. Ague said she had. Weber asked if Ague had asked Marnie if Wes Beal had ever asked her to go to bed with him. Ague said yes. Ague then asked how was it that she had harassed Marnie Duke, and especially her family. Weber said since Marnie was a minor, Ague had harassed her and her family. Ague explained that she had started her conversation with Marnie by saying she did not care for sexual harassment but she, Ague, was being

involved in this matter and needed to ask Marnie some questions since she did not like hearsay.

According to Ague, she told Weber she was concerned that Beal may have been fired for the wrong reasons – his union activity and/or a vendetta. Twice during the conversation, Ague asked if she could meet with Weber and Marnie. She said she had never been shown a copy of the personnel policies, but she had worked on other boards of directors and helped draft personnel policies, so she knew it was common practice to have some type of mediation procedure. Ague said Marnie had referred her to Green so she had talked with Green also. She further said she had tried to talk to Sanford earlier about Beal's firing but had been unable to speak with her. Weber said he would take the matter under consideration, that Ague should remain on the timeclock but go home and return at 3 p.m.

Weber testified that on 20 March, when he called Ague into his office, he told her a complaint had been filed by and employee regarding being harassed for having reported a sexual harassment. He asked if she knew what he was talking about. Ague said she did not. Weber then asked if the name Wes Beal meant anything to her. Ague said she had heard Beal had been dismissed for sexual harassment. Weber then asked if the name Marnie Duke meant anything to her. To which Ague replied, "Ray, let's not beat around the bush. Sexual harassment is a very serious charge. There may come a day when the Y will need to use it." Ague further said she had heard a lot of "scuttlebutt" around the Y as to why Beal was fired and she wanted to find out for herself.

According to Weber, he told Ague that Marnie and her family had complained as a result of her phone call to Marnie the previous day. He asked if, during the course of that conversation, she had asked Marnie, "What the hell did you do to Wes Beal to get him fired?" Ague said, "I think I said 'what the devil' instead of 'what the hell'." Weber then asked, "Did you ask Marnie if Wes Beal had asked her to sleep with him?" Ague said, "Marnie said no." He further testified that when he asked Ague this latter question, she responded no and said she felt there might be something wrong with Marnie that Marnie was very young and naive and did not understand what sexual harassment was. Ague said she wanted to sit down with Weber, Sanford, and Marnie and discuss it. Weber did not respond to this.[16] Weber said he had listened to the allegations made by Marnie and her parents and now he needed to hear what Ague had to say.

He asked Ague if she had anything else to say. Ague said she had called Jennifer Green and talked to her about her allegation against Wes Beal, and Green had called Beal a real asshole and stated that his behavior was very offensive and obnoxious. Ague said she did not feel

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[16] Respondent's grievance policies state inter alia "if necessary, the department head will set up a conference of all concerned parties and attempt to settle a grievance." However Weber testified that he did not understand Ague to be requesting a meeting under the grievance procedure because immediately before her request, she said Marnie was a young, naive girl who she thought did not understand what sexual harassment was. So, according to him, he understood her to be requesting a meeting with him and Marnie, so she could explain to Marnie what sexual harassment was.

Jennifer Green had grounds for sexual harassment charges against Beal. Weber asked if Marnie has asked Ague to call her. Ague said she had attempted to talk to Marnie several times at work the previous night but it did not work out. Then, just before Marnie left to go home for the evening, she asked Marnie to give her a call at home. When Marnie did not call, Ague called her the next morning.

According to Weber, he asked again, "Did Marnie ask you to call her?" Ague repeated that it had been arranged the night before. She said Marnie had not been very responsive to her questions and did not answer some of them at all. Weber asked if it had occurred to her that Marnie did not want to talk to her about any of this. Weber asked why she had called Marnie, stating that it was not her situation to deal with. Ague said, "I agree it is not my situation to deal with but I'm curious and I wanted to know." She then said she felt Kitty Farquarharson disliked other staff and attempted to get them fired, particularly male staff. Weber said he would take some time to decide what action to take and would meet with her later in the day. Ague said she was getting very uncomfortable about this and that, at their meeting later in the day, she was going to have an attorney present and felt the Y might want one also.

Ague returned at 3 p.m. with Union Representative Kitty Simmons. Weber refused to allow Simmons to be present during this meeting with Ague but did give her a choice of having one of two named employees present. Ague chose Matt Myers, the pool manager who had replaced Kirkland. Present at the meeting were Sanford, Weber, Myers, and Ague. According to Ague, Weber said,

after hearing both sides, Ague was terminated for "gross interference in a sexual harassment complaint." Ague asked in what way she had interfered. Weber said privacy and protection of an employee. Ague asked where that was included in any of their employee policies or grievance procedures or sexual harassment complaints. Weber said the policy had been available to Ague right along. Ague asked if she could see that policy. Weber said yes and gave her a copy of it. According to Ague this was the first time she had ever been given a copy. Weber asked her to sign a termination document. However, she refused and said she was going to proceed further with the matter. The termination from which Ague refused to sign states as reason for termination, "Gross interference with the YMCA's enforcement of anti-harassment, and intimidating and demeaning employees who have filed sexual harassment charges."

Weber testified in essential agreement with Ague as to what was said during this conversation. According to both Weber and Ague, Ague did not mention or explain in either conversation her reference to an affidavit in her conversation with Duke, nor was anything mentioned about the Board in the conversation.[17] Sanford's testimony essentially corroborated Weber. She also testified that Ague never referred to an involvement in the NLRB investigation nor did she ever mention that she was acting at the behest or the request of another employee.

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[17] Weber testified he did not see a copy of the Wes Beal charge until several weeks after it was filed either the day or the first day or two of the week following Ague's termination.

D. Conclusions

1. The effect of the settlement agreement

The complaint alleges that Respondent violated Section 8(a)(1), (3) and (4) of the Act by the postsettlement discharge of Ague and Section 8(a)(1) of the Act by the presettlement issuance of a letter of reprimand to O'Bryan, the interrogation of Ague by Weber, statements made by Klever at employee meetings, and the statement of Kirkland to Ague.

Respondent argues that since it had fully complied with the settlement agreement, the Regional Director had no authority to set aside the settlement agreement; and it is improper to consider any evidence of presettlement conduct. Respondent further argues that the alleged postsettlement conduct is insufficiently related to the conduct underlying the settlement agreement to cast doubt on the integrity of the settlement agreement.

I find no merit in this latter argument. The presettlement conduct included threats of discriminatory action against Ague because of her union activity. The alleged postsettlement conduct involves the implementation of those threats – her discharge. One cannot conclude that this conduct is unrelated. As to Respondent's other argument, it is well-established that a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement *or* if postsettlement unfair labor practices are committed. *Lawyers Cooperative Publishing Company,* 273 NLRB 129. Thus, the initial consideration here must be whether

Ague's postsettlement discharge was unlawful. *Nudor Corporation*, 281 NLRB No. 126. In this regard, presettlement conduct may be considered as background evidence in determining the motive for postsettlement conduct.[18] *Park Manor Nursing Home, Inc.*, 277 NLRB No. 28; *Lawyers Cooperative Publishing Company*, supra, at fn. 4; *Laborers Northern California District Council (Joseph's Landscaping Service)*, 154 NLRB 1384.

2. Ague's discharge

Ague was allegedly discharged because of her telephone conversation with Marnie Duke which Respondent describes as "gross interference with the YMCA's enforcement of anti-harassment, and intimidating and demeaning employees who have filed sexual harassment charges." Respondent argues that the discharge cannot be found unlawful since the conversation was not concerted activity or, if it was, Respondent had no knowledge of its concerted nature.

In *Meyers Industries*, 268 NLRB 493, 497, the Board defined concerted activity: "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." On remand, in *Meyers Industries*, 281

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[18] I have fully considered, and reject, Respondent's contention that I am precluded from considering presettlement conduct because the settlement agreement did not include the language originally proposed by the Regional Office specifically providing that evidence of presettlement conduct could be used in any subsequent proceedings.

NLRB No. 118, the Board adhered to this definition and further stated that where the evidence demonstrates group activities, the Board will find conduct in furtherance of these activities to be concerted whether specifically authorized in a formal agency sense, or otherwise. The Board further explicated that its definition of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."

Here, Beal and Ague had discussed the possibility that his discharge was unlawfully motivated and Beal said he wanted the matter pursued as to whether his discharge was really motivated by the alleged sexual harassment or by his union activities and/or sympathies. Ague proceeded to pursue the matter by speaking to Marnie, as had been suggested earlier by employees Robin Januska and Lou Pilipowski. Thus Ague's telephone call to Marnie was undertaken in support of, and in concert with, a statutory employee. Accordingly, I find that the call constituted concerted activity within the meaning of Section 7 of the Act. *Rockwell International Corp.*, 278 NLRB No. 13.

As to knowledge, Respondent knew that Ague was the instigator of the union organizational effort. She had earlier expressed to Weber some of the concerns of the employees which he obviously assumed was not of concern only to her since he acted on this information. Further, Marnie told Weber that Ague said she was going to give someone an affidavit regarding Beal's discharge. This indicated that she was acting in support of a protest

against his discharge. In these circumstances, I find that Respondent had knowledge of the concerted nature of the call.

Respondent further argues that the call was not protected under Section 7 of the Act because the "offensive nature" of Ague's questions and statements and her insistence on "continuing to pursue the interrogation of Duke in order to persuade . . . [her] she was mistaken" about her sexual harassment charge against Beal constituted a form of sexual harassment prohibited by Title VII which could be imputed to Respondent if it acquiesced therein; and because it presented the potential for coercing or intimidating employees in the exercise of their statutory rights. At the heart of Respondent's position is its contention that under EEOC[19] regulations, an employer is responsible for acts of sexual harassment in the workplace where the employer knows, or should have known, of the conduct unless it can show that it took immediate and appropriate corrective action; and, similarly, an employer who does nothing to stop employees from retaliation against another employee, for opposing sexual harassment will be found liable under Title VII. In this regard Respondent argues that Ague's "offensive" phone call to Marnie and her insistence on pursuing the "disturbing subject" and "attempting to persuade [Marnie] she had not been a victim of sexual harassment" created a hostile environment which amounted to a form of retaliation against Marnie for pursuing her claim of sexual harassment.

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[19] Equal Employment Opportunity Commission.

Further, Respondent argues Ague's call was so contemptible and insubordinate as to warrant discharge and therefore is not conduct protected under the Act. In support thereof Respondent relies upon *Texberry Container Corp.*, 217 NLRB 58; *Montgomery Ward & Co.*, 145 NLRB 846, modified and enforced sub nom. *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889 (C.A. 6 (1965); and *Arnold v. City of Seminole*, 614 F. Supp. 853, 869 (D.C. Okla., 1985). In *Arnold*, fellow police officers in an attempt to dissuade her from pursuing a sex discrimination claim, threatened a female police officer who had taken steps to file a claim of sex discrimination with the EEOC. The police department was found liable under section 704(a) because the department knew of the threats and did nothing to stop them. In *Montgomery Ward*, a leading union adherent and organizer was lawfully discharged because he remarked to a fellow employee, in the presence of an Hispanic coworker, "after the store goes union . . . we won't have to be working with 'wetbacks' and 'niggers'." In *Texberry*, an employee was discharged for spreading false rumors that the employer discriminated against black employees.

I have thoroughly considered Respondent's argument. However, as argued by the General Counsel, although concerted activity for mutual aid and protection may in some circumstances by removed from the protection of the Act, these circumstances have generally been limited by the Board to activity which is violent, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), contravenes the basic policies of the Act, *NLRB v. Sands Mfg. Co.*, 306 U.S. 322 (1939) (strike in breach of collective-

bargaining agreement) or is indefensible. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953) (public disparagement of employer's product).

Clearly Ague's conduct does not fall within the first two categories nor does it fall within the latter category. Although Ague was somewhat lacking in sensitivity, it is apparent that she was simply seeking information as to whether Beal's discharge might have been pretextual. In this regard, I find inapposite the cases relied upon by Respondent. The statements made by Ague during her conversation with Marnie could not reasonably be considered as threats nor was there any disparagement so contemptible or indefensible as to remove her from the protection of the Act.

The General Counsel further contends that the reason asserted by Respondent for Ague's discharge is pretextual and Ague would not have been discharged if she had not been the leading union advocate. Respondent argues that Ague's prior union activities were irrelevant to the decision to discharge her. Rather, according to Respondent, her termination was the result of her interference with a sexual harassment complaint and the possible liability that could be incurred by it because of her conduct; and even if it had known of the concerted nature of Ague's telephone call, she still would have been discharged for her interfering, insubordinate behavior. In support of this position, Respondent contends that because of the effect Ague's conduct was having on Marnie's "emotional stability and work performance," it had an obligation under Title VII to put a stop to Ague's "disturbing behavior" and since it could not stop her

continued interrogation of Marnie, the least required by Title VII was that it disassociate itself from Ague by terminating her employment.

I find Respondent's argument unpersuasive. There is no evidence that Marnie's work performance[20] or her emotional stability was affected. Similarly there is no reliable evidence that any loss of weight or prolonged stomach upset experienced by Marnie was due to the telephone call from Ague as opposed to the general situation of having been directly involved in causing Beal's discharge and being fearful that he might try to retaliate. Furthermore, from all accounts of the various conversations on 19 and 20 March, neither Marnie nor her mother ever informed Respondent of these physical symptoms. Klever admits that Respondent never considered taking any steps short of Ague's discharge to protect Marnie from what it claims was an unwarranted intrusion by Ague. Thus Weber never asked Ague not to discuss the sexual harassment with Marnie. Further, when Ague requested a meeting of all parties, despite a grievance procedure that provides for such a meeting, Weber never explained why he felt such a meeting would be inappropriate nor did he, in any manner, mention Respondent's obligations under Title VII.

This response is suspect when considered in light of Respondent's handling of other terminations. In 1985 and

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[20] Respondent seems to be relying on testimony that Marnie did not work that day. However, according to Marnie, she did not work because someone from the YMCA called and instructed her not to report to work so that she could not talk to Ague.

1986, Respondent discharged only eight employees; one was discharged after failing to report to work for 3 consecutive days, one for drinking on the job, one for sleeping on the job, and, of the two discharged for sexual harassment, one was discharged after a first offense. Of the remaining three, one was discharged for using abusive language after having been counseled for the same offense on a previous occasion. One was discharged for destroying a locker door following an extensive, documented history of previous problems and infractions and, several months prior to his discharge Beal had been counseled regarding conduct which though related to, fell somewhat short of, sexual harassment. Also, Valentine testified that some employees had been counseled for disrupting other employees at work. Thus, except for conduct widely considered to be grounds for summary dismissal, Respondents usual practice appears to involve counseling as a first step.

As set forth above, I find that by her telephone conversation with Marnie, Ague was engaged in protected concerted activity. The disparity and severity of the discipline accorded Ague is indicia of unlawful motivation, *Nucor Corp.*, 230 NLRB 297, and warrants an inference that Respondent seized upon this telephone conversation in order to rid itself of the leading union adherent; and that she would not have been discharged but for her union activities. I therefore find that, by its discharge of Rita Ague on 20 March, Respondent has violated Section 8(a)(1) and (3) of the Act.

The complaint also alleges that Respondent discharged Ague because she gave testimony to the Board in the form of an affidavit and/or because she gathered

information in support of Beal's case before the Board. Respondent contends that it had no knowledge of Ague's intention to give an affidavit and this could not have violated Section 8(a)(4) of the Act. Respondent correctly states that the General Counsel must prove the employer had knowledge that the discharged employee was involved with a Board investigation in order to establish a violation of Section 8(a)(4). *Alert Medical Transport*, 276 NLRB 631; *K & K Transportation Corp.*, 262 NLRB 1481. However, the record does not support its position. Ague told Marnie she needed information because she was giving an affidavit to a man from Denver. Marnie related this to Weber. Since the unfair labor practice charge concerning Beal's discharge, which was served on Respondent 5 or 6 days earlier, had actually been received by Weber's secretary, I do not credit Weber that it was 3 weeks before he saw the charge.[21] Further Klever admits that he was aware of the charge prior to Ague's discharge. I find that at the time of Ague's discharge, Weber knew the Beal charge had been filed, and because of the earlier charge knew generally that a Board investigation entails the taking of affidavits. I therefore find that, although Marnie may not have known to what Ague was referring, Weber knew exactly what she meant.

In these circumstances I find that Respondent had knowledge that Ague was scheduled to give an affidavit to a Board agent and that she was gathering information

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[21] In this regard, I note that Weber was working at the Garden Ranch Center during the week the charge was received and that he had instructed his secretary to inform him as to anything received from the Board.

relating to the Beal charge. Since I have found above that Ague's discharge was motivated by her inquiry into the Beal discharge and Respondent knew the inquiry was for the purpose of obtaining information to give to a Board agent investigating the Beal discharge, I further find that Ague was discharged in violation of Section 8(a)(4) of the Act.

3. The presettlement 8(a)(4) conduct

Since I have found that Respondent engaged in post-settlement unfair labor practices, I further find that the settlement agreement in Case 27 – CA – 9482 was properly set aside and the conduct underlying the agreement is properly before me.

The General Counsel argues that Respondent violated Section 8(a)(1) of the Act by Weber's interrogation of Ague during their 8 October conversation. The testimony as to most of that conversation is not conflicting. To the extent that it is, I credit Ague. Weber had a tendency to tailor his testimony in the manner he deemed most helpful to Respondent. Thus, as noted above, his testimony regarding when he first saw the Beal charge is incredible. He testified with regard to the 20 March conversation with Ague, that she said something might be wrong with Marnie, yet no such statement was in his affidavit and neither Ague nor Sanford testified as to such a remark. He insisted that he thought Ague wanted information simply to satisfy her curiosity, yet Marnie had told him what Ague said regarding giving an affidavit. Also, since Respondent's personnel policy provides for a meeting of the concerned parties as part of the

grievance procedure, I find incredible his claim that he believed Ague asked for a meeting simply because she wanted to explain the meaning of sexual harassment to Marnie.

Weber asked if Ague had made contact with the Union and to whom in the Union she had spoken. He also asked if Ague would report to him any union activities that might be occurring, or would occur in the future. I find these questions to be coercive and therefore violative of Section 8(a)(1) of the Act.

I also credit Ague's undenied testimony that Kirkland told her Respondent intended to reduce her hours and get rid of her because she was a troublemaker. This statement is clearly coercive and I find that Respondent thereby violated Section 8(a)(1) of the Act.

Although there is some dispute as to the exact words used, all witnesses agree that following Ague's remarks about wages and the alleged discharge of an employee because of union activities, Klever made a remark that Ague was out on a limb. According to Ague, he said "If you knew what a limb you've climbed out onto, you'd have heart failure." According to Klever, he said, "Now you are out on a limb. If you knew everything that was going on, you'd have a heart attack."[22] They agree that immediately after this statement he told her to sit down. I conclude that either version conveys the message that she

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[22] I do not credit Valentine's version. I find it incredible that Klever would not recall if he had directly explained that Ague's facts were inaccurate.

had something to fear from the prounion stand she had taken in the meeting. Accordingly, I find that the statement was coercive and in violation of Section 8(a)(1) of the Act.

Ague also testified that Klever said he would do anything he had to do to keep the Union out. According to Klever, he said Respondent would use all legal means to avoid a unionizing effort. According to Killingsworth, Klever said the Y would do everything within their legal means to combat union organization. According to O'Bryan, Klever said Colorado Springs was not a union town and they were not about to let the Union in. It seems somewhat unlikely that, immediately after receiving legal advice as to what he could and could not say, Klever would make the statement attributed to him by Ague. Further, where a slight change in the way a statement is paraphrased could turn a permissible statement into an unlawful one, I am reluctant to find a violation based on the testimony of only one out of the more than 30 persons in attendance. In the circumstances, I find that the General Counsel's evidence is unreliable in this regard. Accordingly, I find that General Counsel has failed to establish that Respondent thereby violated Section 8(a)(1) of the Act.

4. The O'Bryan warning

O'Bryan, a known union adherent, was given a written warning for her remarks to Schwed concerning unionization, which outlined the penalty for any future occurrence of a like nature as "immediate and permanent

termination." Respondent admits that it permits solicitation. However, Respondent contends that it disciplined O'Bryan under its policy of disciplining employees for disruptive behavior and that in order to establish a violation of Section 8(a)(1), the General Counsel must prove that the permitted nonunion solicitation was equally as disruptive as the prohibited union solicitation.

Contrary to Respondent's argument, I find nothing disruptive, by any account, in anything O'Bryan said or did. I further find that it was unreasonable for Respondent to conclude that her conduct was disruptive. To the extent that any disruption occurred, it flowed from Schwed's "after the fact" overreaction to what he perceived as O'Bryan's characterization of him as a coward. She denied that she did so but, even if she had, it could not be characterized as disruptive. The severity of Respondent's response to this minor incident supports an inference that its motivation was unlawful. Buttressing this inference is the fact that the warning was issued without questioning O'Bryan as to what had occurred, despite Killingsworth's admission that Schwed has a tendency to magnify insignificant incidents to the point of becoming very emotionally upset.

In these circumstances, I find that Respondent gave O'Bryan a written warning not because she engaged in disruptive conduct but, rather, because she was discussing unionization. Since nonunion solicitations are permitted, I find that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Rita Ague because she engaged in union or other protected concerted activities, and because she gave testimony to the Board in the form of an affidavit and/or because she gathered information in support of an employee's case before the Board, Respondent has violated Section 8(a)(1), (3) and (4) of the Act.

4. By issuing a letter of reprimand to Bernadette O'Bryan because she engaged in union or other protected concerted activities, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. Respondent has violated Section 8(a)(1) of the Act by threatening an employee with a cut in hours and other reprisals because of her union or other protected concerted activities; and by coercively interrogating an employee about the employee's union activity.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain

affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged Rita Ague, I shall recommend that Respondent reinstate her to her former job or, if such a job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed; and make her whole for any loss of earnings she may have suffered because of the discrimination against her by payment to her of a sum equal to what she normally would have earned from the date of her discharge on 20 March 1986 to the date Respondent offers her reinstatement, less her net earnings during that period. I shall further recommend that Respondent be ordered to expunge from its files any reference to Ague's discharge and, to the extent it has not already done so, rescind and remove from the personnel file of Bernadette O'Bryan the written letter of warning dated 21 November 1985 which relates to union solicitation, and expunge from its file any other reference to this warning letter; and give written notice to each of them that it has done so and that its unlawful conduct will not be used as a basis for further personnel actions against her. See, *Sterling Sugars, Inc.*, 261 NLRB 472. Backpay shall be computed in accordance with the formula approved in *F.W. Woolworth Co.*, 90 NLRB 289, with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651, and *New Horizons for the Retarded, Inc.*, 283 NLRB No. 181. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to

Section 10(c) of the Act, I hereby issue the following recommended:[23]

ORDER

Respondent, YMCA of the Pikes Peak Region, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, issuing letters of reprimand to, or otherwise discriminating against, employees because they engaged in union or other protected concerted activity or because they give testimony to the Board in the form of an affidavit and/or because they gather information in support of an employee's case before the Board.

(b) Threatening employees with a cut in hours and other reprisals because of their union or other protected concerted activities.

(c) Coercively interrogating employees about their union activities.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is found necessary to erfectuate the policies of the Act:

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[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer Rita Ague immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any losses she suffered by reason of the discrimination against her as set forth in the section of this Decision entitled, "The Remedy."

(b) Expunge from its files any reference to the discharge of Rita Ague and notify her in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against her.

(c) To the extent it has not already done so, rescind and remove from the personnel file of Bernadette O'Bryan the written letter of warning dated 21 November 1985 which relates to union solicitation, expunge from its files any other reference to this disciplinary action and notify O'Bryan in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against her.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Colorado Springs, Colorado, copies of the attached notice marked

"Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Decision, what steps Respondent has taken to comply herewith.

Dated: 30 September 1987

/s/ Earldean V.S. Robbins
Earldean V.S. Robbins
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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[24] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Section 7 of the Act gives employees these rights:

To organize;

To form, join, or assist any union;

To bargain collectively through representatives of their owr [sic] choice;

To act together for other mutual aid or protection;

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, issue letters of reprimand to, or otherwise discriminate against employees because they engaged in union or other protected concerted activity or because they give testimony to the Board in the form of an affidavit and/or because they gather information in support of an employee's case before the Board.

WE WILL NOT threaten employees with a cut in hours or other reprisals because of their union or other protected concerted activities.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Rita Ague immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and benefits she suffered by reason of the discrimination against her.

WE WILL expunge from our files any reference to the discharge of Rita Ague and notify her in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against her.

WE WILL, to the extent we have not already done so, rescind and remove from the personnel file of Bernadette O'Bryan the written letter of warning dated 21 November 1985 which relates to union solicitation and expunge from our files any other reference to this disciplinary action and notify her in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against her.

YMCA OF THE PIKES PEAK REGION, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Dominion Plaza, 600 17th Street, 3rd Floor, Denver, Colorado, 80202. Telephone Number: (303) 844-3554.

APPENDIX B

SJC

291 NLRB No. 141

D – 9265
Colorado Springs, CO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DEC 5 1988

YMCA OF THE PIKES PEAK REGION, INC.

and

Cases 27-CA-9482
27-CA-9589-2

OFFICE AND PROFESSIONAL EMPLOYEES, LOCAL UNION NO. 5

DECISION AND ORDER

On September 30, 1987, Administrative Law Judge Earldean V. S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions

(Continued on following page)

We adopt the judge's finding that the Respondent unlawfully discharged employee Rita Ague in violation of Section 8(a)(1), (3), and (4) of the Act. The General Counsel established a prima facie case and the Respondent failed to demonstrate that it would have discharged Ague even absent her protected concerted activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) (approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)).

We note that in its defense the Respondent asserted that the General Counsel failed to establish that Ague was acting in concert with other employees when she telephoned employee Marnie Duke and, also that "Ague's intermeddling, offensive phone call to Duke" lost the protection of Section 7 of the Act.

We conclude, as did the judge, that employees "Beal and Ague had discussed the possibility that [Beal's] discharge was unlawfully motivated and Beal said he wanted the matter pursued as to whether his discharge was really motivated by the alleged sexual harassment or

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(Continued from previous page)

unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do, however, correct an inadvertent error that does not affect the result. The judge entitled sec. III, D, 3, of her decision "The presettlement 8(a)(4) conduct"; as is evident from the remainder of the decision, the heading should read "The presettlement 8(a)(1) conduct."

by his union activities and/or sympathies." Ague pursued the matter by speaking with Duke over the telephone to obtain firsthand information about the sexual harassment complaint filed by Duke. After learning of the call through Duke's complaint, the Respondent discharged Ague. We find that Ague's telephone call to Duke was concerted activity engaged in with or on the authority of other employees, and not solely by and on behalf of the employee herself. See *Oakes Machine Corp.*, 288 NLRB No. 52 (Apr. 14, 1988); *Rockwell Corp.*, 278 NLRB 55 (1986).

It is true that, under certain circumstances, concerted activity for the mutual aid and protection of employees may lose the Act's protection. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939). Those circumstances include public disparagement of an employer's product, a strike in breach of a collective-bargaining agreement, conduct that contravenes the basic policies of the Act, or violence. Ague's conduct, however, does not fall within any of those specific categories, nor does it otherwise amount to egregious misbehavior that should rob this effort to assist fellow employee Beal of its protected character. Thus, Ague's conduct was protected concerted activity. Therefore, to the extent that the Respondent relied on Ague's conduct in telephoning Marnie Duke as cause for her discharge, we find that the Respondent violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, YMCA of the Pikes Peak Region, Inc., Colorado Springs, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. November 30, 1988

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, issue letters of reprimand to, or otherwise discriminate against employees because they engaged in union or other protected concerted activity or because they give testimony to the Board in the form of an affidavit and/or because they gather information in support of an employee's case before the Board.

WE WILL NOT threaten employees with a cut in hours or other reprisals because of their union or other protected concerted activities.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Rita Ague immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the discharge of Rita Ague and notify her in writing that this

has been done and that evidence to the unlawful discharge will not be used as a basis for future personnel actions against her.

WE WILL, to the extent we have not already done so, rescind and remove from the personnel file of Bernadette O'Bryan the written letter of warning dated November 21, 1985, which relates to union solicitation and expunge from our files any other reference to this disciplinary action and notify her in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against her.

YMCA OF THE PIKES PEAK REGION, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 600 17th Street, Third Floor, South Tower, Denver, Colorado 80202-5433, Telephone 303-844-3554.

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

YMCA OF THE PIKES PEAK PEAK REGION, INC., Petitioner,	)	
v.	)	No. 88-2963
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	(Filed Sept. 26, 1990)

Appeal from the National Labor Relations Board
(No. 27-CA-9482)

Raymond M. Denny (N. Dawn Webber, with him on the brief), of Sherman & Howard, Colorado Springs, Colorado, for Petitioner.

Fred L. Cornnell (Peter Winkler, Supervisory Attorney; Joseph E. Desio, Acting General Counsel; Robert E. Allen, Associate General Counsel; Aileen A. Armstrong, Deputy Associate General Counsel, with him on the brief), National Labor Relations Board, Washington, D.C., for Respondent.

Before SEYMOUR and BALDOCK, Circuit Judges, and SEAY,* District Judge.

SEYMOUR, Circuit Judge.

Petitioner YMCA of the Pikes Peak Region, Inc., challenges a National Labor Relations Board order adopting the Administrative Law Judge's ruling that the YMCA violated sections 8(a)(1), (3), and (4) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), and (4) (1988). The Board filed a cross-application for enforcement of the order. We have reviewed the arguments of the YMCA, and we hold that enforcement of the Board order is warranted.

I.

The YMCA of the Pikes Peak Region is a nonprofit, charitable, membership organization with two branches in Colorado Springs, a Downtown Center and a Garden Ranch Center. These facilities offer swimming pools, exercise equipment, weight rooms, tanning beds, meeting areas, and locker rooms, some of which are equipped with saunas, whirlpools, color television, and free toiletries and towels. The YMCA provides a range of health, educational, and recreational programs for children, adults, and senior citizens, including swimming instruction, yoga, aerobics, karate, weight reduction, and

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*The Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

smoking cessation programs. The two facilities have a membership of approximately ten thousand.

Each member of the YMCA receives a card which has a statement of purpose on the back reading in part: " 'The purpose of the Y . . . is to establish and maintain a fellowship of individuals and families of all faiths, and . . . build a Christian society through activities and services which contribute to spiritual, intellectual, physical and social growth.' " Rec., vol. I, at 52.

The YMCA's membership dues and program fees constitute its principal source of income. During calendar year 1986, its gross revenues were $2,674,500, of which $56,700 went to purchase supplies and materials directly from suppliers located outside the State of Colorado. *See* rec., vol. II, g.c. ex. 2. The YMCA of the Pikes Peak Region is affiliated with the YMCA of the U.S.A., to which the local YMCA pays a percentage of its income in exchange for use of the logo, an employee retirement fund, and a number of other services. Local YMCAs must follow the constitution of the national YMCA, but their national affiliation does not require that they honor memberships from locations outside Colorado.

The YMCA's Garden Ranch Center first hired Rita Ague in July, 1985, to work as a substitute on the aquatic staff. In September, she began working twenty hours a week on a regularly scheduled part-time basis. On October 6, during an informal meeting called by aquatic director Diane Sanford and consisting of the entire aquatic staff, Ague voiced concerns she and other employees held about pool safety, wage, and overtime pay problems. Ague suggested to those at the meeting that because of

these concerns, the employees might want to consider bringing in a union, and she passed around an envelope for interested employees to sign. Ague and four other employees put down their names. Ague then contacted the Office and Professional Employees Union, Local No. 5.

The next day, Sanford and Fawn Kirkland, Ague's immediate supervisor, reported to Ray Weber, the Garden Ranch Center executive director, that Ague had circulated the sign-up sheet. On October 8, Weber approached Ague while she was working in the pool area and asked her to come into his office. With Sanford present, Weber expressed his concern that Ague had not come to him first with the problems she saw at the YMCA. According to Ague, Weber then asked her whether she had contacted the union, and when she said that she had, he asked her what specific person she had contacted. He also requested that Ague inform him of "any union activities that might be occurring, or would occur in the future." Rec., vol. I, at 88. At some point in the conversation, they discussed the termination of an employee, whom Ague believed was fired for his union activities, but whom Weber asserted had resigned voluntarily. Within a few weeks of Ague's conversation with Weber, YMCA employees and a union representative began to meet.

On October 14, Fawn Kirkland telephoned Ague to inform her that her hours "had been cut way back." *Id.* at 91. Kirkland told her that there had not been any problem with her work performance, but that Sanford had told

Kirkland that Ague's "hours were being cut back radically and that Ray Weber wanted to get rid of the troublemaker." *Id.* at 92. Kirkland also told her that she had recently submitted her own resignation.

Ague confronted Sanford, who denied making the "troublemaker" comment. Ague informed her that she intended to contact the union regarding her hours change, and she did so. According to Ague, Sanford then told her that "she was still in the process of reshuffling [the schedule], and she would get back to [Ague]." *Id.* at 94. The union sent the YMCA a letter dated October 24 expressing its intent to organize the YMCA workers, and noting that any change in Ague's working conditions as a result of her organizing activities would violate section 8(a)(3) of the Act. *See* rec., vol. II, r. ex. 7. By the end of October, Ague's hours essentially had been restored.

On November 13 and 14, James Klever, the YMCA's president and chief executive officer, conducted mandatory meetings for all employees in order to discuss the current unionization efforts. At one point during a meeting at which Ague was present, Klever commented that "it took a hundred men to build a barn, but one jackass to tear it down." Rec., vol. I, at 98.[1] When Klever opened up the meeting for general discussion, Ague stood up and explained that she was the "jackass" referred to because she was the person who had called the union. She then elaborated upon the reasons why she thought a union was necessary.

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[1] Klever testified that he said "any jackass can tear down a barn, but it takes a craftsman to build one." Rec., vol. I, at 498.

At a later meeting with Klever, Ague again stood up to explain why she favored unionization. She also stated her concern that "when employees had tried to organize . . . they had been asked to resign." *Id.* at 102. According to Ague, Klever then told her that " '[i]f you knew what a limb you've climbed out onto, you'd have heart failure.' " *Id.* She replied, " 'I don't threaten easily,' " and Klever responded, " 'Neither do I.' " *Id.* at 102-03.

During this time, efforts to organize the employees continued. One of the union activists, Bernadette O'Bryan, had a conversation about unionization with co-employee Dennis Schwed on November 15 while both were working in the physical services area. O'Bryan testified that she had asked Schwed, who is mildly retarded and has emotional problems, what he thought of the meetings concerning union organization efforts. He told her he wanted to talk to a friend about unions. O'Bryan suggested he also might want to talk to YMCA employees, and then she mentioned she felt "really frustrated with the narrow-mindedness of the employees that have come to [her] over the years complaining about different policies at the Y and then not doing anything about it." *Id.* at 222.

About a week later, O'Bryan's supervisor, Jim Asleson, called O'Bryan into his office and handed her a letter. The letter was a warning to her that any similar discussion regarding union matters would result in her termination. Asleson told her that Schwed had been very upset after the conversation, and had claimed that O'Bryan had called him a coward. O'Bryan denied that she had referred to Schwed as a coward. She also testified

that she had never been reprimanded in the past for conversations not related to work, nor had her co-workers ever been disciplined for solicitations relating to football tickets or restaurants, for example.

On December 19, the union filed an unfair labor practices charge with the Board. On February 14, 1986, the parties entered into a settlement agreement in which the YMCA promised not to threaten employees with a cut in hours or any other type of retaliation because of their union involvement. The YMCA also agreed not to forbid union solicitation where the YMCA did not forbid other types of solicitation, and to rescind and remove the warning letter from O'Bryan's personnel file. *See* rec., vol. II, r. ex. 10(a).

After the settlement agreement, the employees had further unionization meetings. Towards the end of February, just before Ague left on a vacation, a number of employees signed union authorization cards in Ague's presence. One of these employees was Wes Beal. When Ague returned from her vacation, she discovered that Beal had been fired on March 5 for sexual harassment of Marnie Duke, a sixteen year-old high school student who worked at the Garden Ranch Center as a lifeguard and an instructor. Ague tried to get more information about the firing from other employees, but was unable to learn very much; her co-workers told her that she should talk to Duke if she wanted to learn more.

Ague testified she initially called Beal, who told her that he was "in a state of shock," that "[h]e was extremely surprised at being fired," and that he did not feel he had done anything to warrant the sexual harassment charge.

Rec., vol. I, at 117. Ague asked him whether he thought his firing could be the result of union activities, and Beal responded that he may have aroused the hostility of YMCA management by defending Ague at one of the November meetings with Klever. According to Ague, she then "asked [Beal] if he felt that he wanted to pursue this matter [with the union], and he said yeah, he thought he did." *Id.* at 119.

Ague contacted the union representative, and agreed to give an affidavit on March 19 to an investigating Board agent. Shortly before she was scheduled to give the affidavit, Ague testified that she tried to discuss Beal's firing with Sanford, but Sanford told her she was too busy to talk to her. Ague stated that Sanford promised to get back to her later, but did not.

After unsuccessfully attempting to speak to Duke at the YMCA on March 18, Ague told Duke she would call her at home, and she did so on the morning of March 19. According to Ague, she began the conversation by emphasizing that she was opposed to sexual harassment, and then she asked " 'what in the devil did [Beal] do to you to cause you . . . to file a [sexual harassment grievance].' " *Id.* at 124.[2] When Duke said she did not know, Ague was more specific and inquired whether Beal had touched her or asked her to go to bed with him. To each

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[2] Duke's account differs somewhat: Duke testified that Ague ignored Duke's protestations that she had to leave to go to school, and demanded that Duke tell her "why the hell [Beal] was fired." Rec., vol. I, at 294. Duke also characterized Ague's questions as "demeaning" and "belittling," and she stated that she was very upset by the conversation.

of these questions, Duke responded in the negative. Ague testified she then explained to Duke that she was calling because she had to give an affidavit that day and that she wanted to ascertain whether Beal had been fired for "the right reasons," or because of his union activities. Duke did not elaborate on the substance of the sexual harassment charge, but suggested that Ague call another employee who had problems with Beal. Immediately after the conversation, Duke told her mother that Ague had just telephoned, and her mother called Weber after Duke left for school to express her anger that Ague had called and upset her daughter. Later that day, Weber spoke to Duke, and she relayed the conversation to him, including the fact that Ague was about to give an affidavit.

The next morning Weber, with Sanford, called Ague into his office to question her about the previous day's telephone conversation with Duke. Ague verified that she had asked Duke certain questions, and she explained that she had been concerned that Beal was fired not for sexual harassment, but for his union activity. Ague also asked whether she could meet with Duke and Weber to discuss the charges. Weber told her that he would consider the matter and determine what action to take. Later that afternoon, Weber called Ague back into his office, where he told her she was being terminated for "gross interference in a sexual harassment complaint." *Id.* at 134.

The union filed an unfair labor practices charge with the Board in which it alleged that the YMCA had discriminated against Ague by firing her because of her union activity, had coerced and restrained Ague because of her union activity, and had unlawfully discriminated against

O'Bryan by issuing her a letter of reprimand. The administrative law judge ruled that the YMCA had violated sections 8(a)(1), (3), and (4) of the Act. In so doing, the ALJ set aside the settlement agreement because it found that the YMCA engaged in post-settlement unfair labor practices. The Board affirmed the findings and conclusions of the ALJ and adopted the ALJ's order.

II.

The YMCA first argues that the YMCA's impact on interstate commerce was insufficient to warrant the Board's exercise of its jurisdiction. Board jurisdiction is of two types, statutory and discretionary. Statutory jurisdiction derives from section 10(a) of the Act, which grants the Board the power "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1988). Because Congress has vested in the Board "the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause," *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam), the Board may exercise its broad statutory jurisdiction whenever "an employer 'has more than a de minimis impact on the flow of interstate commerce.' " *NLRB v. Southeast Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428, 430 (9th Cir. 1982) (citation omitted).

Although its statutory jurisdiction is quite broad and therefore is not challenged by the YMCA, the Board has limited its jurisdictional reach under its discretionary powers. The Board curtails its jurisdiction by adhering to self-imposed minimum jurisdictional guidelines based on dollar amounts, which enables the Board to distinguish

between those enterprises essentially local in character and those with a pronounced impact on the flow of interstate commerce. *See* R. Gorman, *Labor Law* § 2 (1976). A business generally must meet one of two relevant dollar limitations before the Board will assert its jurisdiction. If a business is a retail enterprise, it ordinarily must have a gross annual business volume of $500,000 and must make substantial purchases from or sales to other states on a direct or indirect basis. The Board will generally assert jurisdiction over a non-retail establishment if the gross outflow or inflow of revenues across state lines is at least $50,000. *See NLRB v. Marsden*, 701 F.2d 238, 241 (2d Cir. 1983). Of course, it is important to remember that "all of the above dollar standards are adopted and applied as a matter of the Board's discretion . . . . Thus, the Board has asserted jurisdiction regardless of whether its dollar standards have been satisfied where 'public policy requires the Board to exercise jurisdiction to the fullest extent.' " Gorman, *Labor Law* § 2, at 25 (citation omitted). Furthermore, "[i]n light of the broad discretion given to the Board in the exercise of its jurisdiction, courts should intervene only where there is obvious unjust discrimination." *Southeast Ass'n*, 666 F.2d at 431.

The YMCA raises several points in support of the argument that the Board inappropriately exercised its discretionary jurisdiction. First, the YMCA asserts that the ALJ incorrectly applied the retail standard to it. The basis for the YMCA's argument is not altogether clear. It emphasizes its charitable character, and thus seems to equate retail with for-profit and non-retail with not-for-profit. As the ALJ correctly pointed out, however, it is the fact that the YMCA's "services are directly to ultimate

consumers," rec., vol. III, doc. 1, at 5, that makes it a retail establishment. *See, e.g., Bussey-Williams Tire Co.*, 122 NLRB No. 137, 43 LRRM 1266 (1959). The YMCA's gross annual business volume and its purchases from other states satisfies this retail standard. Even if the YMCA is categorized as a non-retail establishment, the direct inflow of materials from outside of Colorado in 1986 was $56,700. This amount meets the Board's jurisdictional guidelines.

The YMCA also argues that the Board should have asserted jurisdiction only upon finding that the YMCA had a "significant" impact on interstate commerce. Citing *Ming Quong Children's Center*, 210 NLRB No. 125, 86 LRRM 1254 (1974), it contends that charitable organizations as a general rule do not have such an impact. This contention misstates the law. In *The Rhode Island Catholic Orphan Asylum (St. Aloysius Home)*, 224 NLRB No. 70, 92 LRRM 1355, 1357 (1976), the Board expressly did away with the *Ming Quong* rule:

> "[W]e see no reason to establish separate standards for institutions that seek to accomplish the same end but differ only in whether they are charitable or noncharitable. The sole basis for declining or asserting jurisdiction over charitable organizations will not be identical with those which are not charitable."

That non-profit institutions should be analyzed for jurisdiction in a manner identical to that applied to their for-profit counterparts has been consistently reaffirmed. *See NLRB v. Lighthouse for the Blind*, 696 F.2d 399, 404 n.21 (5th Cir. 1983) (" 'Congress appears to have agreed that nonprofit institutions "affect commerce" under modern economic conditions' " (quoting *NLRB v. Yeshiva Univ.*,

444 U.S. 672, 681 n.11 (1989)); *Long Stretch Youth Home, Inc.*, 280 NLRB No. 79, 122 LRRM 1272, 1275 (1986); *Conway R.R. YMCA*, 237 NLRB No. 178, 99 LRRM 1157, 1158 (1978) ("the Board for jurisdictional purposes no longer distinguishes between profit and nonprofit organizations"). Furthermore, it is irrelevant for jurisdictional purposes that an enterprise is wholly charitable in its *purpose*, as well as in its organizational structure.[3] *See The United Way of Howard County, Inc.*, 287 NLRB No. 98, 127 LRRM 1185 (1988) (nonprofit corporations engaged in activities solely for benevolent purposes cannot avoid the rule of *St. Aloysius Home* and the inclusion of such corporations within NLRB jurisdiction); *Conway R.R. YMCA*, 99 LRRM at 1158 (charitable or worthy purpose not basis for declining jurisdiction).

As with all organizations, charitable organizations must have a sufficient impact on interstate commerce for the Board to exercise its jurisdiction. *See United Way*, 127 LRRM at 1185. Because the YMCA has met the discretionary jurisdictional standards, *see Greater Boston YMCA*, 243 NLRB No. 70, 101 LRRM 1521 (1979), we conclude that the Board did not abuse its discretion in finding the YMCA's impact on interstate commerce to be "sufficient."[4]

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[3] Although we need not decide whether the YMCA has a charitable purpose, we agree with the ALJ that the statement of purpose notwithstanding, the YMCA is in many ways indistinguishable from a for-profit health club. *See* rec., vol. III, doc. 1, at 6.

[4] The YMCA makes one final argument. It contends that he Board's exercise of jurisdiction was inappropriate because

(Continued on following page)

III.

The YMCA challenges the Board's finding of unfair labor practices based on both pre-settlement and post-settlement conduct. With regard to pre-settlement conduct, the YMCA contends that the settlement agreement entered into by the parties precludes what in effect is relitigation of that earlier conduct. Even if the Board properly set aside the settlement agreement, the YMCA argues that the evidence is insufficient to find it committed unfair labor practices by interrogating Ague and reprimanding O'Bryan. It likewise argues that the evidence of post-settlement conduct is insufficient to support a finding that the firing of Ague constituted an unfair labor practice.

A.

As a preliminary matter, we note that a court reviewing a Board order "should grant enforcement if the Board correctly interpreted and applied the law and if its findings are supported by substantial evidence in the record, considered in its entirety." *Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1471 (10th Cir. 1983); *see*

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the Board only adopted the ALJ's opinion and did not articulate its own reasons for assertion of jurisdiction. This argument has no merit. We have long held that the Board need not restate the ALJ's opinion in its entirely if the ALJ's findings sufficiently inform the parties of the disposition of the arguments made. *See The Artra Group, Inc. v. NLRB*, 730 F.2d 586, 590 (10th Cir. 1984); *NLRB v. Wichita Television Corp.*, 277 F.2d 579, 585 (10th Cir.), *cert. denied*, 364 U.S. 871 (1960).

also Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-91 (1951); *Le'Mon v. NLRB*, ___ F.2d ___, ___, No. 88-2833, slip op. at 5-6 (10th Cir. May 7, 1990); 29 U.S.C. § 160(e) (1988) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive"). Substantial evidence is defined as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Universal Camera*, 340 U.S. at 477 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B.

A settlement agreement is binding on all parties to it, but it "will be set aside if its provisions are breached or if postsettlement unfair labor practices are committed." *Lawyers Coop. Publishing Co.*, 272 NLRB No. 31, 118 LRRM 1213, 1215 n.4 (1984); *see also Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1109 (1st Cir. 1981). If the settlement agreement is set aside, the employer's pre-settlement conduct may be assessed for unfair labor practices. Moreover, in order to determine whether post-settlement conduct constitutes an unfair labor practice, "presettlement conduct may be considered as background evidence in determining the motive or object underlying a respondent's postsettlement conduct." *Lawyers Coop.*, 118 LRRM at 1215 n.4; *see also NLRB v. Shurtenda Steaks, Inc.*, 397 F.2d 939, 945 (10th Cir. 1968) (employer unfair labor conduct antedating settlement admissible to determine purpose and intent of post-settlement conduct); *Mason & Hanger-Silas Manson Co.*, 270 NLRB No. 71, 116 LRRM 1073, 1074-75 (1984) (employer conduct prior to settlement agreement relevant regarding lack of anti-union animus).

Because a finding of a post-settlement unfair labor practice or breach of a provision of the settlement agreement is necessary before the pre-settlement conduct can be re-examined, we turn first to the issue of Ague's discharge, which is the basis of her claim that the YMCA committed post-settlement unfair labor practices.

C.

The ALJ found that the discharge of Ague constituted an unfair labor practice in violation of sections 8(a)(1), (3), and (4).[5] A violation of sections 8(a)(1) and (3) occurs where four factors are present. An employee must have been engaged in concerted activity, the employer must have known of the concerted nature of the activity, the

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[5] The relevant portions of section 8, 29 U.S.C. § 158 (1988) read:

> "(a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
>
> (4) to discourage or otherwise discriminate against an employee because [she] has filed charges or given testimony under this subchapter. . . . "

concerted activity must be protected under the Act, and the employer's discrimination must have been motivated by the employee's protected concerted activity. *See Meyers Industr. (Meyers I)*, 268 NLRB 493, 115 LRRM 1025, 1029 (1984), *remanded on other grounds, Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied, Meyers Industr., Inc. v. Prill*, 474 U.S. 948 (1985), *on remand*, 281 NLRB No. 118, 123 LRRM 1137 (1986), *aff'd, Prill v. NLRB*, 835 F.2d 1481 (D.C. 1987), *cert. denied*, 108 S. Ct. 2847 (1988).

Section 7 of the Act, 29 U.S.C. § 157 (1988), guarantees that employees "have the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The ALJ, focusing on Ague's telephone call to Duke, found that call to be "concerted activity" within the meaning of section 7.[6]

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[6] Ague was discharged for " 'gross interference with the YMCA's enforcement of anti-harassment, and intimidating and demeaning employees who have filed sexual harassment charges.' " Rec., vol. III, doc. 1, at 24. The ALJ analyzed the unfair labor practice charge by focusing on Ague's phone call and using the four-part test. Although we will follow this approach in assessing the sufficiency of the evidence, we note the existence of alternative ways to structure the analysis. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983), for example, the Supreme Court stated that "if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that [it] proffers are pretextual, the employer commits an unfair labor practice." A court therefore could avoid determining whether the phone call, standing by itself, was concerted

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The YMCA disputes the finding of concertedness. It asserts, for example, that no employee *specifically* asked Ague to telephone Duke, that Beal admitted his discharge was due to his sexual harassment of Duke, that Beal never stated he was certain his discharge was due to his union activities, and that it was Ague who suggested taking a complaint to the union. These contentions by the YMCA are either inaccurate or irrelevant. Our review of the record shows that while Beal emphasized he was *charged* with sexual harassment, he did not understand why he had been fired, and that perhaps it was a result of his support of Ague at the meeting with Klever. The fact that Ague suggested further investigation and consultation with the union is completely irrelevant. Concerted activity is activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee [herself]." *Meyers I*, 115 LRRM at 1029. Evidence that Ague received authority from Beal to pursue the matter on his behalf is sufficient to support a finding of "concertedness."[7] *See B & P Motor Express Inc. v. NLRB*,

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activity and instead focus on the entire range of Ague's union activity and inquire whether the phone call was a mere pretext for the discharge. Because the ALJ found that the YMCA "seized upon this telephone conversation in order to rid itself of the leading union adherent; and that she would not have been discharged but for her union activities," rec., vol. III, doc. 1, at 27-28, and because our review of the record yields substantial evidence to sustain this finding, the ALJ's result could be upheld under the alternate analysis.

[7] The YMCA also asserts that Local No. 5, the union Ague contacted, was not the official collective bargaining representative and was less interested in Beal than in pursuing its own

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413 F.2d 1021, 1023 (7th Cir. 1969) (action in support of fellow employee over her grievance is concerted activity within meaning of section 7); *see also* rec., vol. III, doc. 4, at 2 (Board found that "Ague's telephone call to Duke was concerted activity engaged in with or on the authority of other employees, and not solely by and on behalf of the employee herself").

The YMCA then contends that the ALJ had insufficient evidence to support her finding that the YMCA knew Ague's telephone call to Duke was concerted activity protected under section 7.[8] We disagree. As the ALJ noted, Duke told Weber that Ague had referred to an "affidavit" she had to give. *See id.*, doc. 1, at 25. Additionally, Ague testified that she expressed her concern about Beal's discharge to Sanford prior to her telephone call to Duke. *See* rec., vol. I, at 121.

The YMCA's next contention is that Ague's telephone call caused harm as defined by Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1982), and created an intimidating and coercive environment for other employees in the exercise of their statutory rights. The call, according to the YMCA, therefore should lose the protection of the Act. In support of its argument, the YMCA engages in a lengthy discussion in which it

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agenda. The union's status, of course, has no bearing on whether Ague herself was engaged in concerted activity, since section 7 protects employees who assist labor organizations or "engage in *other* concerted activities."

[8] The YMCA does not contend that it lacked knowledge of Ague's union organizational effort.

emphasizes the potential liability it would face for any acts of retaliation against a sexually-harassed employee and for acts of sexual harassment of one of its employees by another. We agree with the ALJ that these arguments lack merit. Title VII makes it unlawful "for an *employer* to discriminate against any" employee who has complained of sexual harassment. 42 U.S.C. § 2000e-3(a) (1982) (emphasis added). Ague was neither the employer nor acting on her employer's behalf. Unlike *Arnold v. City of Seminole*, 614 F. Supp. 853, 859, 870 (E.D. Okla. 1985), which the YMCA cites, this case does not involve a city police chief threatening a plaintiff with discharge if she pursued her right to be free of sexual harassment. Here, by contrast, Ague was not in a position of authority over Duke, nor was she threatening her with discharge. This is also not a case in which the telephone call contributed to the hostile working environment envisioned by Title VII, since the regulations prohibit "verbal or physical conduct *of a sexual nature* . . . [which] has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1989) (emphasis added). Ague's conduct is not consistent with that described by the regulations.

Finally, we must consider whether Ague's concerted activity should lose the protection of the Act because it was otherwise "unlawful, violent, in breach of contract or 'indefensible.' " *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1287 (10th Cir. 1980), *citing NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). We have reviewed the record, and we agree with the ALJ that Ague's conduct does not fall into any of these unprotected categories, nor does it "amount to egregious misbehavior that should rob

this effort to assist fellow employee Beal of its protected character," rec., vol. III, doc. 4, at 3. Although Ague's call was somewhat imprudent and "lacking in sensitivity," *id.*, doc. 1, at 26, there is substantial evidence to conclude that Ague was simply attempting to ascertain whether Beal's discharge was union-related.[9]

The fourth and final factor we must consider is whether Ague's discharge was motivated by her protected activity. The YMCA does not dispute that Ague's telephone call to Duke to investigate Beal's discharge, determined to be a concerted, protected activity, was the basis for her discharge. This alone would be sufficient for a section 8(a)(1) and (3) violation. But even if the telephone call itself were not protected, we agree that the YMCA failed to prove by a preponderance of the evidence that Ague's discharge rested on her unprotected conduct, and not on her union activity. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983);[10]

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[9] We disagree with the dissent that this court's decisions in *Timpte Inc. v. NLRB*, 590 F.2d 871 (10th Cir. 1979), and *Montgomery Ward & Co. v. NLRB*, 374 F.2d 606 (10th Cir. 1967), require a different outcome. In *Timpte*, we emphasized that the employee's conduct was not impulsive but constituted a deliberate refusal to stop using filthy language in union campaign material after being requested to do so. *See* 590 F.2d at 873-74. In *Mongtomery Ward*, the employee called a customer of the store a bastard and a son-of-a-bitch. *See* 374 F.2d at 611 n.4. Here, Ague and Duke were co-employees, and while we do not condone Ague's conduct and believe whether it should be unprotected is a close question, we are not persuaded the Board erred in its determination.

[10] The Supreme Court in *Transportation Management*, 462 U.S. at 402-03, approved of the Board's allocation of the burden

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See also Head Division, AMF, Inc. v. NLRB, 593 F.2d 972, 975 (10th Cir. 1979) ("the discharge of employees who are actively engaged in union affairs gives rise to an inference of impermissible, anti-union discrimination"). The YMCA failed to prove that the telephone call was anything but a pretext for Ague's discharge. Furthermore, we agree with the ALJ that because the YMCA generally required employees engaged in comparable conduct to undergo counseling but did not discharge them, the

> "disparity and severity of the discipline accorded Ague is indicia of unlawful motivation, and warrants an inference that [the YMCA] seized upon this telephone conversation in order to rid itself of the leading union adherent; and that she would not have been discharged but for her union activities."

Rec., vol. III, doc. 1, at 27-28 (citation omitted). The Board's determination that the YMCA violated section 8(a)(1) and (3) by discharging Ague is therefore supported by substantial evidence.

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of proof as set out in *Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). As characterized by the Court, *Wright Line* held that "the General Counsel carried the burden of persuading the Board that an antiunion animus contributed to the employer's decision to discharge and employee," but that the employer could assert an affirmative defense and "avoid the finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if [s]he had not been involved with the union." *Transportation Management*, 462 U.S. at 395.

The ALJ also found that the YMCA, by discharging Ague because she gave an affidavit to a Board agent, violated section 8(a)(4), which prohibits discrimination against an employee who gives testimony in an unfair labor practices investigation. The YMCA contends that this finding is not supported by substantial evidence because there was no proof it had knowledge of Ague's intention to give an affidavit, and because Ague was terminated solely for interfering with a sexual harassment investigation. As the ALJ noted, however, Duke told Weber of Ague's intention to give an affidavit, and the unfair labor practice charge concerning Beal's discharge was received by Weber's office prior to Ague's discharge. Since we have already held that the evidence supports a finding that Ague's investigation, a concerted and protected activity, motivated her termination, we conclude there is substantial evidence that the YMCA violated section 8(a)(4).

D.

The YMCA argues that its post-settlement conduct was unrelated to the pre-settlement conduct, and that this conduct therefore should not be used to set aside the agreement. In support of its position, the YMCA cites to *Deister Concentrator Co.*, 253 NLRB No. 40, 106 LRRM 1053, 1056 (1980), which held that rescission of a settlement agreement was unnecessary where the employer had substantially complied with the agreement and where post-settlement violations were essentially unrelated to the subject matter of the agreement. Here, by contrast, we have upheld the Board's conclusion that the YMCA effectively violated the agreement by retaliating

against Ague for her activities on behalf of the union. *See* rec., vol. II, g.c. ex. 1(h), at 2 (settlement agreement). Moreover, the YMCA's pre- and post-settlement conduct were related since, as the ALJ observed, the prior conduct included threats of action against Ague, and the latter "involve[d] the implementation of those threats – her discharge." Rec., vol. III, doc. 1, at 24. Accordingly, we reject the YMCA's arguments and agree with the Board that the settlement agreement was properly set aside. We therefore turn to an assessment of the pre-settlement conduct.[11]

The YMCA objects to four findings of the ALJ concerning the pre-settlement conduct. It contends that the Weber/Ague conversation did not constitute coercive interrogation; that Kirkland's comments to Ague were not coercive; that Klever's statements to Ague during the meeting were not coercive; and that the letter of reprimand to O'Bryan because of her discussion with Schwed did not violate section 8(a)(1) and (3). We have reviewed the record as a whole with due regard for the ALJ's responsibility to judge the demeanor and credibility of

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[11] The YMCA makes one additional argument that the six-month statute of limitations in section 10(b) of the Act, 29 U.S.C. § 160(b) (1988), bars reinstatement of the settled charge. That settled charge was timely filed, and we recognize the established doctrine that section 10(b) notwithstanding, the General Counsel may litigate matters embraced in a settlement agreement later validly set aside. *See Hotel & Restaurant Employees Local 19*, 281 NLRB No. 86, 124 LRRM 1110 (1986). If this doctrine were not valid, there would be little to prevent a party from breaching a settlement agreement with impunity once the six-month period had expired.

the witnesses. We are persuaded there is substantial evidence to support the ALJ's findings.

We therefore grant enforcement of the Board's order. No. 88-2963, YMCA of the Pikes Peak Region, Inc. v. National Labor Relations Board.

BALDOCK, Circuit Judge, dissenting.

The court correctly holds that the YMCA was engaged sufficiently in interstate commerce to fall under the jurisdiction of the National Labor Relations Act, 29 U.S.C. § 160(a). I take issue, however, with the court's conclusion that the YMCA violated the Labor Act when it discharged Rita Ague for harassing Marnie Duke. Although substantial evidence supports the Board's determination that Ague's call constituted concerted activity, the rude and insensitive manner in which Ague conducted her investigation placed her conduct outside the protection of Section 7, 29 U.S.C. § 157.

I.

Marnie Duke began working at the Garden Ranch YMCA in 1985 when she was fifteen years old. Rec. vol. I at 279-80. Duke's first exposure to Wes Beal's advances took place in September of that year:

> I was cleaning in the lobby and he mentioned for me to come into the pool area. He had something to talk to me about. [H]e was sitting down in a chair and he pulled me over by my leg and he put his hands in between my legs and he start[ed] up my thigh quite a ways.

Id. at 281-81. In the following months, Beal repeatedly and without permission played with Duke's hair and

rubbed her shoulders. *Id.* at 282-83. In January 1986, Duke was sitting next to the swimming pool with a towel over her lap. Beal sat down next to her, placed his hand underneath the towel and between her thighs. *Id.* at 284. Duke was frightened by the incident but declined to report Beal's behavior because she believed (incorrectly) that the YMCA managers were friends of Beal. *Id.* Thereafter, Beal continued to take liberties with Duke's person until March 1986 when she garnered the courage to report the harassment to Jim Klever, the regional president and chief executive officer. *Id.* at 288-89. Klever assured Duke that he would take care of the situation; Beal was discharged the following day. *Id.* at 290. Duke and her mother remained frightened that Beal would continue to harass her. Ray Weber, executive director of the Garden Center facility, assured Duke and her mother that the YMCA would do everything in its power to protect Duke from further harassment. *Id.* at 334, 390-91.

On the morning of March 18, Duke received a telephone call from Rita Ague requesting in a demeaning manner information on Beal's firing:[1]

> [S]he told me that she had a few questions to ask about Wes's termination. And I told her that I did not have time to talk because I was going

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[1] Although Ague's version of the conversation differs somewhat, her testimony confirmed Duke's in all important respects. Ague is not sure she used the term "why in the hell" suggesting instead that she said "why the devil." She also denied using a condescending tone. Rec vol. I at 180. However, Ague acknowledged asking Duke "a string of questions: 'Did he touch you? Did he . . . ask you to sleep with him? Did he say anything to you?' " *Id.*

> to school. She ignored that and she went on and she said that Wes does not know why the hell he was fired. She asked what I had said to get him fired, and I again just was ignoring. I was trying to get away from it. I was very nervous. I did not know what to say. She was an adult. I wasn't. I was taught to respect adults. I felt that it was none of her business at this point. She continued and once more said Wes does not know why the hell he was fired. And I told her that I had to go to school. And she again – she said, 'I mean it wasn't as it he asked you to go to bed with him or anything.' Demeaning me, belittling me.

Id. at 295-96. Ague's call had an intimidating effect upon Duke: "I felt like this was never going to end. I had adults coming on to me and I was only 16 years old and they were just really coming on to me strong." *Id* at 297-98.

Mrs. Duke was furious when she learned of Ague's conversation with her daughter. *Id.* at 338. She contacted Weber at the YMCA and told him that "we were not going to tolerate that [sic] kind of actions against our daughter." *Id.* at 338-39. Mrs. Duke demanded to know what the YMCA was going to do to protect her daughter from further harassment by Ague. *Id.* at 392. Weber discussed Ague's phone call with Diane Sanford, Ague's supervisor, expressing shock that a grown women [sic] would interfere in the private matter between Duke and the YMCA and would then press the matter once Duke stated repeatedly that she did not wish to talk to Ague. Weber told Sanford that the YMCA had a continuing duty to protect victims of sexual harassment. *Id.* at 456. Weber also discussed the situation with James Klever. Klever was appalled by Ague's conduct and expressed concern

that the YMCA could be subject to liability for not taking action in response to Mrs. Duke's complaints. *Id.* at 525, 527-28.

The following day, Weber called Ague into his office and inquired about the telephone call. Ague stated that Duke did not understand what sexual harassment was, but did acknowledge making the telephone call and asking Duke specific questions concerning Beal. *Id.* at 396, 459. Later that day, Weber convened a second meeting with Ague whereupon he informed her that she was terminated for interfering with the YMCA's protection of sexual harassment victims. *Id.* at 402.

II.

Section 7 of the Labor Act guarantees workers "the right to join or assist labor organizations, to bargain collectively through representative of their own choosing, and to engaged [sic] in other *concerted activities for the purpose of collective bargaining or other mutual aid or protection*. . . . " 29 U.S.C. § 157 (emphasis supplied). "[I]n enacting § 7 . . . , Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984). Section 7 fundamentally seeks to protect workers' freedom of association in attaining improved wages and working conditions. *See* Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects*, 51 U. Chi L. Rev. 1012, 1028-29 (1984). While Section 7 does

not define "concerted activity," the term "clearly . . . embraces the activities of employees who have joined together in order to achieve common goals." *City Disposal*, 465 U.S. at 830-31.

In determining whether an employee's action is "concerted," the touchstone inquiry is whether the action "reflect[s] actual group will in the workplace." *JMC Transp. v. NLRB*, 776 F.2d 612, 618 (6th Cir. 1985). An individual acting alone engaged in concerted activity when she acts on behalf of the workforce. *See City Disposal*, 465 U.S. at 831.[2] A conversation between an individual worker and her employer therefore may be concerted activity, so long as the conversation is related to group action in the interest of the employees. *NLRB v. Empire Gas*, 566 F.2d 681, 684 (10th Cir. 1977) (following *Mushroom Transp. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). On the other hand, personal, albeit work-related, complaints by an individual employee do not constitute protected Section 7 activity. *City Disposal*, 465 U.S. at 833 n.10.

Action on behalf of an individual grievance also may constitute concerted activity. *See Intermountain Rural Elec.*

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[2] *See, e.g., Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988); *Rockwell Int'l v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987); *Dayton Typographic Serv. v. NLRB*, 778 F.2d 1188, 1191 (6th Cir. 1985); *JMC Transp.*, 776 F.2d at 618; *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320, 327-28 (7th Cir. 1976); *Randolph Div, Ethan Allen Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975); *Owens-Corning Fiberglas v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969); *see generally* Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Penn. L. Rev. 286 (1981).

Ass'n v. NLRB, 732 F.2d 754, 763 (10th Cir.) (employee argued with employer on behalf of fellow worker), *cert. denied*, 469 U.S. 932 (1984). As Judge Learned Hand explained, the act of association, rather than the object of association, forms the basis of Section 7's protections:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance . . . they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts.

NLRB v. Peter Cailler Kohler Swiss Chocolates, 130 F.2d 503, 505 (2d Cir. 1942) (L. Hand, J.).

"The fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *City Disposal*, 465 U.S. at 837. Section 7 does not protect concerted activity that is unlawful, violent, in breach of contract or otherwise indefensible. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *see also* R. Gorman, *Basic Text on Labor Law* 302-07 (1976). An employer therefore may discipline an employee for uttering defamatory or otherwise inappropriate statements, even when those statements constitute concerted activity. *See Old Dominion Branch No. 946, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 270-73 (1974) (federal labor law does not pre-empt application of state libel law where statements uttered with knowledge of falsity or reckless disregard for the truth) (interpreting

Linn v. Plant Guard Workers of Am. Local 114, 383 U.S. 53, 61 (1966)).[3] Neither do profane or otherwise intemperate expressions carry the protections of Section 7. *See Timpte Inc. v. NLRB*, 590 F.2d 871, 873 (10th Cir. 1979) (circulation of letter disparaging employer in profane language).[4] But not every impropriety committed during concerted activity places the employee beyond the protective shield of Section 7. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). "[L]abor disputes are ordinarily heated affairs, and . . . confrontations between management and employees cannot be held to the standards of cool, analytical impartiality characteristic of the debating society." *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 514 (5th Cir. 1968). The employee's right to engage in concerted activity must permit some leeway for impulsive behavior. *Thor*, 351 F.2d at 587; *see Coors Container Co. v. NLRB*, 628 F.2d 1283, 1287 (10th Cir. 1980) (vulgar language directed at security guard improperly interrogating employee's "boycott Coors" sign protected).[5]

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[3] *See, e.g., Bowling Green Mfg. v. NLRB*, 416 F.2d 371, 375-76 (6th Cir. 1969) (defamatory statements in radio interview during organizing campaign); *Maryland Drydock Co. v. NLRB*, 183 F.2d 538, 539 (4th Cir. 1950) (distribution of "scurrilous and defamatory literature" during organizing campaign); *NLRB v. Atlantic Towing Co.*, 180 F.2d 726, 726 (5th Cir. 1950) (false accusation that employer committed unfair labor practice) (*per curiam*).

[4] *See also Borman's Inc. v. NLRB*, 676 F.2d 1138, 1139 (6th Cir. 1982) (employee wore T-shirt emblazoned with profane anti-employer slogan); *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 515 (5th Cir. 1968) (employee called manager "Castro" in open plant meeting).

[5] *See also NLRB v. Southwestern Bell*, 694 F.2d 974, 976-78 (5th Cir. 1982) (expletive uttered by shop steward in heated

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In determining whether Section 7 protects concerted statements, courts must examine the overall context in which the statement was uttered, *see NLRB v. New York Univ. Medical Center*, 702 F.2d 284, 290 (2d Cir.), *vacated on other grounds*, 464 U.S. 805-805 (1983), balancing the employees right to engage in concerted impulsive behavior against the right to the employer to maintain order and respect, *Thor*, 351 F.2d at 587. Where a worker's intemperate language is unrelated to any labor dispute, the concerted nature of those remarks does not invoke Section 7 protections. *Compare NRLB* [sic] *v. Local 1299, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 476-77 (1953) (distribution of handbills attacking company not protected where handbills made no reference to labor dispute) *with Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 215-16 (9th Cir. 1989) (where letter by newspaper employees was directly related to labor dispute, distribution of letter to newspaper's advertisers protected). Disparaging remarks by union activists engaged in concerted activity therefore are entitled to less protection when directed against casual third parties than when addressed to management or non-striking employees. *Montgomery Ward & Co. v. NLRB*, 374 F.2d 606, 608 (10th Cir. 1967) (picketing employee's epithets toward customer crossing picket line unprotected).[6]

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argument with supervisor over allocation of overtime work); *Crown Central Petroleum v. NLRB*, 430 F.2d 724, 730-31 (5th Cir. 1970) (course language in course [sic] of grievance committee meeting).

[6] *See also Hotel Holiday Inn De Isla Verde v. NLRB*, 723 F.2d 169, 171 (1st Cir. 1983) (disparaging remarks to hotel guests by picketing employees not protected).

III.

In the instant case, Ague had at least some reason to conjecture that Beal had been fired for his expression of union support. Although Ague's telephone call, at least in Duke's eyes, appears more officious intermeddling than union organizing, evidence in the record exists from which the Board reasonably could conclude that Ague was acting on Beal's behalf when she made the call. Accordingly, given our highly deferential standard of review, Ague's telephone call to Duke constituted concerted activity. *See City Disposal*, 465 U.S. at 829 (determination by Labor Board as to whether particular activity is concerted for purposes of Section 7 "implicates its expertise in labor relations.").

The court states that although Ague's telephone call was "somewhat imprudent and lacking in sensitivity," Ct. op. at 22, it did not " 'amount to egregious misbehavior that should rob this effort to assist fellow employee Beal of its protected character[.]' " *Id.* (quoting rec. vol. III, doc.4, at 3). The record reflects, however, that Marnie Duke suffered repeated humiliation at the hands of Wes Beal; only after much anguish did she garner the courage to report Beal's conduct to his superiors. Duke remained afraid of retaliation and relied upon assurances by the YMCA that she would be protected from further abuse. Viewing Ague's telephone call within the overall context of Duke's relationship with the YMCA, *see New York University*, 702 F.2d at 290, and considering the disparity in age between Ague and Duke, Ague's conversation falls within the category of expressions that this court held unprotected in *Timpte*, 590 F.2d at 873. Informing a sixteen year old victim of sexual harassment that "its [sic]

wasn't as if he asked you to go to bed with him or anything," rec. vol. I at 296, after ignoring her repeated pleas to end the conversation is indefensible. For a stranger in this situation to subject a victim of sexual harassment to an explicit inquisition over precisely what formed the basis of her complaint when such information already had been provided to the YMCA and the victim clearly did not wish to discuss the matter is beyond acceptable discourse. *See Washington Aluminum*, 370 U.S. at 17. Ague's insensitive attitude toward Duke is illustrated by her subsequent statement that Duke did not know what sexual harassment was. Rec. vol. I at 459. If Ague needed to know the details of Beal's harassment of Duke, such information could have been elicited through a formal grievance procedure or an NLRB hearing. Her telephone call therefore was not merely "imprudent," Ct. op. 22; she addressed Duke "in such an abusive manner that [s]he los[t] the protection of § 7." *City Disposal*, 465 U.S. at 837.

By relying upon *Coors*, 628 F.2d at 1287, to support its holding that Ague's telephone call was protected activity, the court ignores the crucial distinction between concerted language directed against employers and such conduct directed toward innocent third parties. Although the rancor which often accompanies labor-management disputes precludes the application of parlor etiquette to concerted activity, in *Montgomery Ward* this court held that a much higher standard of decency is required where concerted statements are directed at parties not involved in the dispute. 374 F.2d at 608-09. In *Coors*, course language was uttered during an argument between employees and company officials; we held the employees'

imprudent language to be an outburst subject to Section 7 protections. 628 F.2d at 1285-88. In contrast, Ague directed her derisive comments, not toward her employer, by rather toward a highly-reticent sixteen-year-old girl with no involvement in the unionization effort. Ague's comments were not impulsive statements uttered in the heat of a dispute; she "thought long and hard" before calling Duke. Rec. vol. I at 181. The court's reliance on *Coors* therefore is misplaced. This case is controlled instead by our holding in *Montgomery Ward* where we held that an epithet voiced by a picketing employee toward a customer crossing the picket line was unprotected concerted conduct. 374 F.2d at 608-09. Just as we held the picketing employee's conduct indefensible in *Montgomery Ward*, so should the court have held Ague's conduct unworthy of the protections of Section 7.

None of the policies underlying the relaxed standard for concerted statements are implicated in this case. Had Ague's remarks been uttered in the context of formal grievance procedure where frank exchange is necessary to the successful resolution of disputes, her concerted statements might be protected under Section 7. *See Crown Central Petroleum v. NLRB*, 430 F.2d 724, 730-34 (5th Cir. 1970) (because unfettered exchange necessary in resolution of grievances, employees' intemperate remarks uttered during grievance committee meeting protected). However, Ague's abusive comments were made on her own initiative in a private telephone conversation with no adjudicative function. There is no reason why such statements uttered in this private context are entitled to any of the protections guaranteed by Section 7.

IV.

The court states that even if Ague's telephone call to Duke was unprotected conduct, the YMCA seized upon the call as a pretext to rid itself of a union activist. Ct. op. at 23. I disagree. A preponderance of the evidence supports the view that the YMCA's discharge of Ague represented a legitimate effort to shield itself from Title VII liability from Marnie Duke and her parents. Even if the YMCA entertained some anti-union animus when it discharged Ague, the record shows that a well-grounded fear of Title VII exposure constituted an independent and legitimate basis for her discharge. As explained below, such fears were entirely reasonable given the current state of Title VII. *See NLRB v. Transportation Management Corp.*, 463 U.S. 393, 397 (1982) (where employer would have discharged employee for permissible reasons irrespective of union activity, improper motivation does not confer liability under the Labor Act).

A plaintiff may maintain an action for sexual harassment under Title VII, 43 U.S.C. § 2000e-2(a), by showing that her employer created a hostile working environment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987). A hostile working environment exists when sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Vinson*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3)). To prevail on a hostile environment theory, a plaintiff must prove that the harassment was "sufficiently severe or pervasive 'to alter the conditions of [the victim's]

employment and create an abusive working environment.' " *Hicks*, 833 F.2d at 1413 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). Conduct need not be explicitly sexual to constitute sexual harassment under Title VII. *Hicks*, 833 F.2d at 1415.[7] Rather, "an actionable harassment claim must establish by the totality of the circumstances, the existence of a hostile or abusive *environment* which is severe enough to affect the psychological stability of a minority employee." *Vance v. Southern Bell*, 863 F.2d 1503, 1510 (11th Cir. 1989) (emphasis in original). To determining whether an employer is liable for creating a hostile environment, we must "look to agency principles for guidance." *Vinson*, 477 U.S. at 72; *Hicks*, 833 F.2d at 1417. "Thus, if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer will be liable." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990); *see Silver v. KCA, Inc.*, 586 F.2d 138, 142 (10th Cir. 1978).

In the instant case, Duke suffered repeated and uninvited sexual contact from YMCA employee Wes Beal. Once the YMCA learned of Beal's conduct, it had an affirmative duty under Title VII to take prompt remedial action. Although Beal was promptly discharged, Ague's intrusive call inquiry into the intimate details of Duke's problems with Beal over Duke's repeated objections constituted further harassment. The court states that because

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[7] *See also Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *McKinney v. Dole*, 765 F.2d 1129, 1138-39 (D.C. Cir. 1985).

Ague's conduct was not explicitly sexual in nature, it could not fall under Title VII. Ct. op. at 22. This ignores our earlier holding in *Hicks* that explicitly sexual conduct is not necessary to effectuate a hostile working environment under Title VII. 833 F.2d at 1483. Demanding another detailed account of Beal's conduct in a belittling demeanor from a sixteen year old sexual harassment victim who did not wish to discuss the matter contributed to the hostile environment in which Duke was obliged to work. *See Vinson*, 477 U.S. at 65. Duke was not able to distinguish between Beal's conduct and Ague's conduct; they were all part of the same pattern.[8] In determining whether the YMCA created a hostile working environment, a court therefore could look to the totality of the circumstances considering Ague's telephone call along with Beal's untoward conduct. *See Vance*, 863 F.2d at 1510.

---

[8] The fact that in Duke's eyes the conduct of Ague and Beal were part of the same pattern is illustrated by Duke's comments to her mother after the phone call:

> I told her that I was really tired of the whole situation. It was just continuing. And I told her that maybe it would have been best if I would have just quit at that time, before I had even said anything about Wes Beal. And then none of this would have happened . . . She told me that, yes, that would have been the easy way out, but we both decided mutually that, no. Wes Beal and Rita Ague were both harassing people. They were bothering us. The [sic] had no right to do that, and I stood up for not only me, but othe. people too that would further along get the same treatment I had.

Rec. vol. I at 305.

The YMCA had actual knowledge both of Beal's harassment and Ague's intrusive telephone call. Indeed, following Ague's telephone call, the YMCA was faced with a demand by Duke's mother to protect her daughter from further harassment. Rec. vol. I at 338-39, 392. Had YMCA management not acted on these demands, the organization could have been exposed to Title VII liability on an agency theory. *See Vinson*, 477 U.S. at 72; *Hicks*, 833 F.2d at 1417. Although the ALJ found that potential Title VII liability did not form the basis of the YMCA's decision to fire Ague, this finding was based upon an erroneous understanding of the agency principles underlying Title VII. Accordingly, the ALJ's finding that Title VII exposure was not a component of the YMCA's decision to fire Ague was not entitled to deference by this Court. *See Pullman Standard v. Swint*, 456 U.S. 273, 287 (1982).

The dismissal of Rita Ague by the YMCA did not violate the National Labor Relations Act. I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

YMCA OF THE PIKES PEAK REGION, INC.,	)	
Petitioner,	)	
v.	)	No. 88-2963
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

ORDER
Filed October 25, 1990

Before HOLLOWAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

(2)

No. 90-1241

Supreme Court, U.S.
FILED
APR 8 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

YMCA OF THE PIKES PEAK REGION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that petitioner violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act by discharging an employee because she engaged in union and other protected activity and because she gave an affidavit and gathered information in support of another employee's case before the Board.

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In the Supreme Court of the United States

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YMCA OF THE PIKES PEAK REGION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C39) is reported at 914 F.2d 1442. The decision and order of the National Labor Relations Board (Pet. App. B1-B6, A1-A63) are reported at 291 N.L.R.B. No. 141.

JURISDICTION

The opinion of the court of appeals was filed on September 26, 1990. A petition for rehearing was denied on October 25, 1990. The petition for a writ of certiorari was filed on January 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner, a nonprofit membership organization, operates two recreational centers in Colorado Springs, Colorado. Pet. App. A3-A7. In September 1985, Rita Ague was hired as a part-time employee on the aquatic staff at one of these centers. Early in October, Ague solicited employees to sign a document indicating an interest in organizing a union, and then contacted the Office and Professional Employees Union, Local No. 5 (the Union). Pet. App. A12.

On October 8, Ray Weber, the center's executive director, summoned Ague to his office, where he interrogated her about her union activity. Pet. App. C4, A12-A13, A14-A15. On October 14, Fawn Kirkland, Ague's direct supervisor, telephoned Ague to inform her that her hours had been cut because Ray Weber had identified her as a "troublemaker" and wanted to get rid of her. Ague told Kirkland that she intended to report the matter to the Union. Pet. App. A15. Shortly thereafter, the Union wrote petitioner a letter identifying Ague as a leader of its organizing effort. Pet. App. C4, A17. On December 19, the Union filed unfair labor practice charges alleging, *inter alia*, that petitioner had unlawfully interrogated and discriminated against Ague. The parties entered into a settlement agreement on February 14, 1986. Pet. App. A27-A28.

b. In late February, just before Ague left on a vacation, a number of employees signed union authorization cards in Ague's presence; one of those employees was Wes Beal. Pet. App. A29. When Ague returned from her vacation, she learned that petitioner had discharged Beal for allegedly sexually harassing Marnie Duke, a sixteen-year old who worked part-time as a lifeguard and swimming instructor. Pet. App. A32. Ague called Beal, who told her that he was surprised at having been discharged, and that

he had done "absolutely" nothing to Duke to warrant a complaint. Asked if he thought he had been discharged because of his union activity, Beal said that he might have aroused the hostility of executive director Klever by defending Ague at the employee meeting Klever called to discuss the Union's organizing effort. Ague asked whether Beal wanted her to pursue the matter and to inform the Union, and Beal responded affirmatively. Pet. App. A32-A33. Ague then contacted a Union representative and told her about Ague's conversation with Beal. Pet. App. A33. On March 12, the Union filed an unfair labor practice charge alleging that Beal's discharge was unlawful, Pet. App. A29, and Ague agreed to give an affidavit to the Board agent investigating the matter. Pet. App. A33.

Before she was scheduled to give her affidavit, Ague unsuccessfully attempted to discuss Beal's discharge with Diane Sanford, one of petitioner's supervisors. Pet. App. A33-A34. Ague then attempted to speak with Duke at work on March 18, the day before Ague was to give her affidavit. Pet. App. A34, A36. She was unable to do so and told Duke she would call her at home the following morning.

The next morning, Ague called Duke. Pet. App. A34. She started out by indicating that she was "all for women" and did not approve of sexual harassment, but that Beal did not know why he was fired. She then asked what Duke had said to Weber and Klever to get Beal fired. Pet. App. C8, A34, A37, A39. When Duke said that she did not know, Ague pressed the matter further, inquiring whether Beal had touched Duke or asked her to go to bed with him. Pet. App. C8, A34-A35, A38. Duke responded that she did not have time to talk because she had to leave for school. Pet. App. A36, A38-A39. Ague said that a man was coming from Denver to take her affidavit, that she was trying to find out if Beal was fired "for the right reasons" or because of his union activity, and that she had very little to go on. Pet.

App. C9, A34, A46. After the conversation, Duke's mother called Weber to complain that Ague had called and upset her daughter. Pet. App. A36-A38. That afternoon, Weber spoke to Duke, who told him that Ague had called in connection with her affidavit. Pet. App. A38-A39. Later that day, Ague gave an affidavit to a Board agent. Pet. App. A33.

The next morning, Weber and Sanford questioned Ague about her conversation with Duke. Ague verified that she had asked Duke certain questions, and explained that she had contacted Duke because she was concerned that Beal was discharged not for sexual harassment, but for union activity. Pet. App. C9, A39-A41. In accordance with the grievance procedure set forth in petitioner's published employee handbook, Ague asked to meet with Duke and Weber to discuss the matter further. Pet. App. A39-A40, A41 n.16, A50. Weber told Ague that he would consider the matter. Later that afternoon, Weber called Ague to his office and told her she was being discharged for "gross interference in a sexual harassment complaint." Pet. App. C9, A42-A43.

c. The Union then filed unfair labor practice charges regarding Ague's discharge. The Board's regional director set aside the earlier settlement agreement, and issued a complaint. Pet. App. A1-A2. The Board, in agreement with the administrative law judge, found that petitioner had violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (4), by discharging Ague because she engaged in union and other protected, concerted activity and because she gave an affidavit to the Board and gathered information in support of Beal's case before the Board. Pet. App. A51, A52-A53, A57, B2-B3.[1]

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[1] The Board also found that petitioner violated Section 8(a)(1) of the Act by threatening Ague with a cut in her working hours and other

Relying upon its decisions in *Oakes Machine Corp.*, 288 N.L.R.B. 456 (1988), enforced in part and remanded on other grounds in part, Case No. 89-4052 (2d Cir. Mar. 23, 1990) and *Rockwell Int'l Corp.*, 278 N.L.R.B. 55 (1986), the Board found "that Ague's telephone call to Duke was concerted activity engaged in with or on the authority of other employees, and not solely by and on behalf of the employee herself." Pet. App. B2-B3, A46, A51. The Board further found that petitioner was aware of the "concerted nature of the call." Pet. App. A47.

The Board rejected petitioner's contention that, even if Ague's phone call to Duke constituted concerted activity, petitioner discharged her because Ague's conduct was "intermeddling," "offensive," "retaliat[ory]," and "a form of sexual harassment prohibited by Title VII which could be imputed to [petitioner]" if not renounced. Pet. App. B2, A47. The Board found that petitioner's asserted reason for discharging Ague was a pretext and that she would not have been discharged but for her union activities. Pet. App. A51. The Board noted that there was no evidence that Duke's work performance was affected by the call, or that any of her alleged physical symptoms were reported to petitioner's officials; that Executive Director Weber denied Ague's request for a meeting of all parties even though counseling was petitioner's usual first step in handling employee misconduct, and despite a grievance procedure that provides for such a meeting; and that Weber did not mention petitioner's obligations under Title VII as a reason for Ague's dismissal. Pet. App. A50-A51.

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reprisals because of her union activity and by coercively interrogating Ague about her union activity. The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act by issuing a letter of reprimand to employee Bernadette O'Bryan because she engaged in union activity. Pet. App. A55, A56, A57. These findings were affirmed by the court of appeals (Pet. App. C24-C25) and are not challenged here.

The Board further found that, even if the offensive nature of Ague's questions and statements and the fear of Title VII liability motivated petitioner's decision to discharge Ague, that action was nonetheless unlawful because Ague's phone call was protected by Section 7 of the Act.[2] The Board acknowledged that "under certain circumstances, concerted activity for the mutual aid and protection of employees may lose the Act's protections." Pet. App. B3 (citing *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), and *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332 (1939)). Those circumstances include "public disparagement of an employer's product, a strike in breach of a collective-bargaining agreement, conduct that contravenes the basic policies of the Act, or violence." Pet. App. B3. The Board found that Ague's conduct did not fall within those categories, nor did it "amount to egregious misbehavior that should rob [her] effort to assist fellow employee Beal of its protected character." *Ibid.*; see also Pet. App. A49. Moreover, the Board found the Title VII cases relied upon by petitioner to be "inapposite" because in those cases, the employee was participating in conduct in violation of Title VII. Here, by contrast, the Board noted that "[a]lthough Ague was somewhat lacking in sensitivity, it is apparent that she was simply seeking information as to whether Beal's discharge might have been pretextual." Pet. App. A48-A49.[3]

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[2] Section 7 of the Act, 29 U.S.C. 157, provides, in relevant part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[3] The Board held that petitioner had also violated Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), which prohibits conduct that interferes with the Board's processes, because it found that Ague's discharge was motivated by her contacting Duke about Beal's discharge, and that peti-

2. The court of appeals, with one judge dissenting, enforced the Board's order. The court first rejected petitioner's argument (not renewed in its petition to this Court) that YMCA's impact on interstate commerce was insufficient for the Board to exercise its jurisdiction in this case. Pet. App. C10-C13.

On the merits, the court affirmed the Board's findings that petitioner's discharge of Ague violated Section 8(a)(1) and (3) of the Act. Applying the test from *Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493 (1984), the court found that there was substantial evidence supporting the Board's conclusion that Ague's pursuit of an investigation into Beal's discharge was concerted activity and that petitioner was aware of its concerted nature. Pet. App. C17-C19.

The court rejected petitioner's argument that Ague's behavior was not "protected under the Act" because it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. C19-C20. The court noted that "Ague was neither the employer nor acting on her employer's behalf," and that Ague was not "in a position of authority over Duke, nor was she threatening her with discharge." *Ibid.* The court also found that Ague's conduct had not "contributed to the hostile working environment envisioned by Title VII, since the regulations only prohibit 'verbal or physical conduct *of a sexual nature* . . . [which] has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment.'" *Ibid.* (quoting 29 C.F.R. 1604.11(a) (1989)).

The court also upheld the Board's finding that Ague's conduct was not sufficiently "indefensible" to remove it from the protection of Section 7. Pet. App. C20-C21. The court agreed with the Board that, while Ague's conduct was

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tioner knew Ague's purpose in contacting Duke was to obtain "information to give to a Board agent investigating the Beal discharge." Pet. App. A53.

"somewhat imprudent and lacking in sensitivity," Pet. App. C21 (internal quotation marks omitted), it was not unlawful, violent, in breach of contract, or otherwise indefensible – the categories of otherwise protected conduct that might lose their protected status under Section 7. Pet. App. C20, citing *Coors Container Co.* v. *NLRB*, 628 F.2d 1283, 1287 (10th Cir. 1980) (in turn citing *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 17 (1962)).

Finally, the court affirmed the Board's finding that petitioner's reliance on Ague's alleged harassment of Duke was pretextual – that petitioner had "seized upon this telephone conversation in order to rid itself of the leading union adherent." Pet. App. C17-C18 n.6, C21-C22.[4]

ARGUMENT

Petitioner argues (Pet. 14-45) that the court of appeals' decision – that petitioner violated the National Labor Relations Act – is "in conflict" with petitioner's obligations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* This fact-bound challenge to the lower court's decision does not warrant review by this Court.

1. An employer violates Section 8(a)(3) of the Act by discharging an employee for engaging in union activity, and violates Section 8(a)(1) by discharging an employee for engaging in concerted activity for the employees' mutual aid

[4] Judge Baldock, in dissent, agreed that Ague's conduct "constituted concerted activity," but found that "the rude and insensitive manner in which Ague conducted her investigation placed her conduct outside the protection of Section 7." Pet. App. C25, C35. Judge Baldock also rejected the majority's alternative finding that petitioner's reliance upon the harassing nature of the phone call was purely pretextual. In his view, "[e]ven if [petitioner] entertained some anti-union animus when it discharged Ague, the record shows that a well-grounded fear of Title VII exposure constituted an independent and legitimate basis for her discharge." Pet. App. C36.

or protection. *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 394, 397-398, 401-402 (1983). An employer violates Section 8(a)(4) of the Act by discharging an employee for "participation in the important developmental stages [of a Board proceeding] that fall between" the filing of a charge and an appearance at a hearing. *NLRB* v. *Scrivener*, 405 U.S. 117, 121-125 (1972). Once the General Counsel has made a prima facie case that an employee's protected conduct "was a substantial or motivating factor in the discharge," the employer will be found to have violated the Act unless it can prove that the discharge "would have occurred in any event and for valid reasons." *Transportation Management Corp.*, 462 U.S at 400.

In this case, as the court below found, the General Counsel made a prima facie case by showing that petitioner was aware of Ague's leadership in the Union's organizing efforts (Pet. App. C19 n.8); and that petitioner was hostile to these efforts (Pet. App. C17 n.6). Although petitioner contends that it had a legitimate, nondiscriminatory reason for its discharge of Ague—that Ague's telephone call to Duke constituted sexual harassment or other indefensible misconduct—the Administrative Law Judge (Pet. App. A51), the Board (Pet. App. B1-B2), and the court below (Pet. App. C17-C18 n.6) all found that petitioner did not, in fact, discharge Ague for making the telephone call to Duke, but rather "seized upon this telephone conversation in order to rid itself of the leading union adherent." Pet. App. C22 (quoting Pet. App. A51).

The record fully supports this finding. Petitioner made no mention of its obligations under Title VII when it discharged Ague. Pet. App. A50. Petitioner discharged Ague without considering any steps short of discharge, despite a policy ordinarily requiring use of counseling prior to discharge, even for serious offenses. *Ibid.* Petitioner also rejected Ague's request for a meeting attended by all

parties involved in the dispute, despite a written policy providing for such grievance meetings. *Ibid.* Petitioner did so although such a meeting would have afforded it an opportunity to distance itself from Ague's conduct and to determine if it would be repeated, matters petitioner now asserts (Pet. 33-43) were of prime concern in its decision to discharge Ague. The Board (Pet. App. A51) and the court below (Pet. App. C17-C18 n.6, C21-C22) thus correctly found that the disproportionate severity of the discipline, and the summary manner in which was imposed, belied petitioner's claim that the discharge was brought about by the phone call.[5]

2. Petitioner now concedes (Pet. 24-25) that Ague's phone call was concerted activity for "mutual aid or

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[5] The fact that petitioner surely could not be held liable under Title VII for Ague's behavior underscores the Board's finding that petitioner's asserted concern for Duke was pretextual. Ague was not Duke's supervisor and did not have any authority over Duke. Indeed, Ague's purpose in calling Duke went against petitioner's interest in stopping its employees from unionizing. Ague's single phone call also plainly did not create a sexually hostile work environment. Pet. App. C20. It was neither threatening nor sexual in nature, and had a legitimate investigative purpose. Nor was it so "severe or pervasive [as] to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 67 (1986). The cases cited by petitioner (Pet. 30-32) are not to the contrary. See *Meritor Savings Bank* v. *Vinson*, *supra* (over the course of several years, the plaintiff's supervisor fondled and touched the plaintiff and other female employees, demanded sexual intercourse, followed plaintiff into the women's room, and exposed himself to her); *Baker* v. *Weyerhaeuser Co.*, 903 F.2d 1342, 1345 (10th Cir. 1990) (senior employee, with history of sexual harassment complaints against him, who occasionally gave plaintiff "operational orders," made repeated explicit sexual advances and, when his efforts were rebuffed, gave plaintiff "'extra' work"); *Hunter* v. *Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1421 (7th Cir. 1986) (employee subjected to a prolonged campaign of harassment because of his race).

protection" within the meaning of Section 7 of the Act, and that petitioner was aware of the purpose of Ague's call. Petitioner argues, however, (Pet. 22-45) that the "rude and insensitive" manner in which Ague acted toward Duke over the phone stripped her conduct of protection under Section 7.

Conduct otherwise protected by Section 7 does not lose that protection unless it is unlawful, violent, in breach of contract, or an "indefensible" reflection of disloyalty "unnecessary to carry on the workers' legitimate concerted activities." *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *NLRB* v. *Empire Gas, Inc.*, 566 F.2d 681, 684-687 (10th Cir. 1977). For reasons given above (note 5, *supra*), Ague's conduct did not violate Title VII. Nor did it fall into any of the other categories of egregious misbehavior that would strip that conduct of its protected character. Ague used no abusive language, and did not threaten Duke with physical or other harm. And although Ague's call may have been "somewhat lacking in sensitivity" (Pet. App. A49), it was apparent that she was simply seeking to ascertain whether Beal's discharge was union-related.[6] The Board and the court below thus reasonably

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[6] The decision of the Tenth Circuit in this case does not, as petitioner contends (Pet. 25), conflict with that court's own prior decisions in *Timpte, Inc.* v. *NLRB*, 590 F.2d 871 (1979), and *Montgomery Ward & Co.* v. *NLRB*, 374 F.2d 606 (1967). (Nor, in any event, would any such intra-circuit conflict warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).) In *Timpte*, the court emphasized that the employee's conduct was a deliberate refusal to stop using filthy language in union campaign material after being requested to do so. 590 F.2d at 873-874. In *Montgomery Ward*, the employee called a customer of the store a bastard and a son-of-a-bitch. 374 F.2d at 611 n.4. Here, by contrast, Ague used no abusive or obscene language, Ague's phone call was a single, isolated incident, and Ague's conduct was in direct response to a discharge she suspected might be unlawful and retaliatory. Pet. App. C21 n.9.

concluded that Ague's conduct was not such as to deprive it of the protection of Section 7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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